UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ABU DHABI INVESTMENT AUTHORITY,

Plaintiff,

v. 12 CV 00283 (GBD)

CITIGROUP,

Defendant.

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New York, N.Y.
November 8, 2012
11:52 a.m.

Before:

HON. GEORGE B. DANIELS

District Judge

APPEARANCES

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(In open court; case called)

THE COURT: Good morning, gentlemen.

Why don't I hear I guess it's the motion to vacate?

MR. EISBERG: Yes, your Honor. Thank you.

Good morning, your Honor.

David Eisberg for petitioner Abu Dhabi Investment Authority also known as ADIA.

Your Honor, the arbitration award here has to be vacated because there was no colorable basis for the panel to disregard Abu Dhabi law which was applicable to ADIA's four claims.

Now, your Honor, to get around the panel's manifest disregard of the controlling law Citi is asking this Court, they're asking your Honor to rule that choice of law is so discretionary that it becomes unreviewable under the manifest disregard standard and under Section 10(a)(4) of the FAA.

Now, your Honor, we submit it's obvious why it is that Citi, why their lead argument is to ask your Honor to ignore Supreme Court precedent, including the landmark decision in Stolt-Nielsen, and hold that the panel's choice of law is somehow exempt from manifest disregard review. And we submit it's because Citi knows, Citi knows that when your Honor does apply the manifest disregard standard in a truly meaningful way as required by the Supreme Court and as required by the FAA, the panel's choice of law here simply cannot withstand

scrutiny.

So Citi wants you to ignore that the U.S. Supreme Court has made absolutely clear, your Honor, that choice of law in international arbitrations plainly is reviewable for manifest disregard. Especially, especially when it comes to choice of law the manifest disregard review has to be meaningful and searching and not a perfunctory rubber stamp. And the courts have recognized -- as I'll explain in a minute -- the courts have recognized, your Honor, that this is for good reason.

THE COURT: Let me go right to the heart of that part of your argument. You're arguing that it's a manifest disregard of the choice of law rather than a manifest disregard of Abu Dhabi law.

MR. EISBERG: Your Honor it ends up being both.

THE COURT: It can't be both. Those are two different analyses. Either they knew what the choice of law -- they knew what they were supposed to do in order to come up with the choice of law and you say they disregarded that process.

MR. EISBERG: Correct.

THE COURT: Or are you saying that they disregarded -- whether or not they went through that process or not, they somehow manifestly disregarded Abu Dhabi law.

If they went through the process -- if they properly went through the analysis of how you do choice of law, then

it's a harder argument for you to make that if they went through that analysis, simply because they didn't come up with the result that you wanted them to come up with, that I'm supposed to set it aside on that basis.

MR. EISBERG: Your Honor, we are arguing that they disregarded the rule of law that applies to how to chose the correct law that was applicable to the arbitration.

THE COURT: Didn't they clearly state, exactly as you state, how they were supposed to make that choice?

That's the first question. You would agree with that?

MR. EISBERG: I would agree that they purported to make a choice-of-law analysis.

THE COURT: I'm not talking about the analysis yet. I'm just talking about whether or not they identified the correct legal analysis that should be applied, and then at least went through a process in which they said that they were trying to apply that analysis.

MR. EISBERG: Your Honor, the correct process, the correct law was brought to their attention.

THE COURT: Right.

MR. EISBERG: And in the award they do advert to that process but they manifestly disregard those principles.

THE COURT: The law isn't about manifestly disregarding the principles. It's about manifestly disregarding the law.

Manifestly disregarding the principles sounds to me like a result-oriented argument.

MR. EISBERG: No, your Honor.

THE COURT: The question really is did they -- isn't the real question: Did they know what choice-of-law analysis they were supposed to apply? Did they make some attempt to do so? And does this -- did their decision indicate an analysis using that law? And if it did indicate an analysis using that law, if you or I disagree with the result, that doesn't make it a manifest disregard of the law.

MR. EISBERG: Your Honor, the answer to that is in the Stolt-Nielsen case, if I could discuss that for a minute, if I can give you a hand up that will help me go through it.

THE COURT: Does the other side have that?

Because it's basically -- I don't want to simplify your argument but it's basically a contacts test that they were supposed to apply.

MR. EISBERG: Your Honor, if you would give me a moment because Stolt-Nielsen is so important here and I think it answers this question. If you would turn to tab A of the handout just to be clear about what Citi is arguing here.

What Citi is arguing here --

THE COURT: I don't want to know about what they're arguing. I want to know about why you argue -- let me reject that argument.

MR. EISBERG: Okay.

THE COURT: Then let me go back to your argument.

MR. EISBERG: My argument is that --

THE COURT: I don't accept their argument that somehow I'm supposed to disregard what they're required to do. I accept your argument it was required to make a choice-of-law analysis.

MR. EISBERG: Yes.

THE COURT: And the appropriate way to do that is to layout clearly for you and for me what law they should apply, to then use that law to analyze whether or not it should be New York or Abu Dhabi law, and then come up with a decision about which law to apply.

Now I'm trying to figure out where the heart of your argument is. The heart of your argument is not that they didn't know what the law was and they didn't clearly articulate exactly what you said is the analysis that they're supposed to do. You don't argue that they were unaware of that. As a matter of fact, your argument -- to manifestly disregard the law, your argument starts out with they knew it and they should have applied it.

So if they knew the law and they articulated the correct standard and then they started making an analysis with regard to that standard, and then they say well we look at these factors and we look at these factors and in our opinion

the factors are stronger for New York than Abu Dhabi so we applied New York law. How does that constitute a manifest disregard of the law? That's just an argument you disagree with the weight that they've given the factors and the facts.

MR. EISBERG: Respectfully, your Honor, that's what happened -- what you just described is the type of thing that happened in Stolt-Nielsen. If you would let me talk for a minute about Stolt-Nielsen it will directly address what your Honor just said.

So let's talk about Stolt-Nielsen for a minute.

If you look at tab C of the handout. In Stolt-Nielsen, like here, there was a standard set of AAA rules that applied. And the AAA rules in Stolt-Nielsen gave the arbitrators more latitude on the choice of law. Not less. They gave the arbitrators more latitude. It said they are free to apply any law that they want to.

And unlike the arbitration rules here, unlike the arbitration rules here, the AAA rules in Stolt-Nielsen lacked subsection (3). Here there's Article 28(3). And if you look on the hand-up in C, the rules here on Article 28 subsection (c) say the panel cannot decide the law ex aequo et bono. In other words, the rules here say the arbitrators must apply the law. Whereas, in Stolt that prohibition was missing.

Now to get right to your Honor's question about wait a second if the arbitrators looked at the rule and they said they

were applying it and they came up with an answer, you just don't like it, aren't you out of luck.

THE COURT: You would agree. You are out of luck if that's the case.

MR. EISBERG: Your Honor what I would tell you is that Stolt-Nielsen answers that question.

THE COURT: But Stolt-Nielsen does not stand for the proposition that if they cited the correct law, they applied it, and they made a mistake, and you don't like the result, that somehow that's a manifest disregard of the law. It does not stand for that proposition.

MR. EISBERG: If the purported application of the law amounts to having no colorable basis or strains credulity, that --

THE COURT: That's different question.

MR. EISBERG: Yes, your Honor.

THE COURT: So tell me how this strains credulity for them to say: Well, you got a choice-of-law provision in your contract that chooses New York law. That Citibank is here in New York. That you have some correspondence going back and forth between New York and Abu Dhabi. And you have some trips going back and forth between New York and Abu Dhabi. The primary dispute is a contractual one. So we decide that, on balance, that New York has a greater interest than Abu Dhabi.

How is that manifest disregard? They could be wrong.

But how is that a manifest disregard under Stolt-Nielsen?

MR. EISBERG: Again, I'm glad you asked about how it is that under Stolt-Nielsen because Stolt-Nielsen does address this directly. It involved the same error that Citi is asking you to make here. And if you would let me talk about what happened in Stolt-Nielsen, we'll see how similar it is to what happened here.

THE COURT: Just print up Stolt-Nielsen.

MR. EISBERG: If you look at Stolt-Nielsen, what you find is that in Stolt-Nielsen -- and this is in item number two on the hand-up, which is hand-up --

THE COURT: Just give me the citation so I can have my law clerk pull it up.

MR. EISBERG: The citation to the Supreme Court decision is 130 S. Ct. at 1758. The citation to the Second Circuit decision is 624 F.3d 157.

THE COURT: Where are you going to be quoting from? The Supreme Court or the Second Circuit?

MR. EISBERG: The Supreme Court, Second Circuit, and the district court which was Judge Rakoff.

THE COURT: Where do you say the determinative language is? I don't need to pull all of them, right?

MR. EISBERG: There's actually language in each of them that's important.

THE COURT: The same language or different?

MR. EISBERG: Different language.

The district court is 435 F.Supp. 2d 382.

Again, if your Honor would indulge me and let me go through this because it's exactly what happened here. It will take a couple of minutes and I'll describe what happened in Stolt-Nielsen and why it's so important because it addresses exactly your question about what happens when an arbitration panel says I'm looking at the rules and I'm applying the rules and here's the answer I get.

What happened --

THE COURT: I'll let you do that. But I'm more interested in the principle of law that you're trying to rely upon rather than saying, Oh, this is what happened in that case.

MR. EISBERG: I will get to that too. I promise you, your Honor, and I appreciate your indulgence on this.

THE COURT: Go ahead.

MR. EISBERG: If you look at item number 2 on hand-up C what you see is that in Stolt-Nielsen the Stolt arbitrators -- and this goes right to your question -- the Stolt arbitrators, like here, expressly purported and applied, purported to apply four sets of laws.

First, the panel expressly considered and purported to apply international arbitration award. Specifically they said we've read twenty-one prior published arbitration decisions and

we're convinced by them. You can see on the hand-ups the cites that tell you where that happened in the panel's award.

THE COURT: But that's not relevant to this case because that's not what happened in this case.

MR. EISBERG: Well in this case the contention, and I thought your Honor's question was, how can it be this manifest disregard if the panel looked at sets of laws and said we're applying them, how can that --

THE COURT: No. I'm trying to understand in what way you say they didn't apply the law that they cited when they went through an analysis of weighing the contacts between New York and Abu Dhabi. It's not that complicated.

MR. EISBERG: Let me get to that. I'll speed through Stolt-Nielsen then. And I'll just say that in Stolt-Nielsen what the Court ended up saying constituted manifest disregard -- I won't go through the rest of the details -- but even though the panel looked at and expressly purported to apply various laws, cited twenty-one prior arbitration decisions, cited New York law and specifically cited a case called Evans, referred to Second Circuit law including a Boeing case and said I'm distinguishing that case, even though the panel ran through all of that and said I'm applying the law, what the Supreme Court said -- and this is critical -- after running through it, the Supreme Court said -- and this is on the second page of hand-up C, item number 4 on hand-up C, the

Supreme Court said: We don't care that you looked at various sets of rules that were urged upon you. We don't care that you specifically analyzed them and came to a conclusion.

The panel said that -- the Supreme Court, excuse me, said that when it comes to choice of law -- and this is in item 4 of the hand-up -- it says, "The arbitrators' proper task was to identify the rule of law that governs, not make public policy. And in 4(d) we say the Supreme Court said it was manifest disregard "because the panel proceeded as if it had the authority of the common-law court to develop what it viewed as the best rule to be applied." And it went on and you can see --

THE COURT: That's not your argument here. You're not arguing that they came up with their own rule.

MR. EISBERG: Your Honor, we are.

THE COURT: Tell me -- show me where they articulated a rule that's different than the rule that's supposed to be applied here, the rule of law. Show me what rule of law they applied that is not appropriate.

MR. EISBERG: The rule of law that they did not apply and that they manifestly disregarded is the rule that says that the law that is to be applied is the law of the location of the plaintiff and where the harm occurred and then there is only a very --

THE COURT: No. But they said that. And they went

through that analysis.

MR. EISBERG: Just like in Stolt, your Honor, that's what I'm trying to get across. In Stolt the Supreme Court said -- and this is on hand-up C.

THE COURT: So what do you say they should have done differently. Not the result. Because I understand -- because your argument still is result-oriented.

Tell me exactly what you say they did in their analysis that was the wrong thing to do.

MR. EISBERG: What they did is they manifestly disregarded the clear-cut rule --

THE COURT: No. That's too vague. Tell me exactly what you say they did. Tell me what the analysis that they did that was the improper analysis. Because otherwise I'm still stuck were they said this is the rule. They analyzed the facts pursuant to this rule. And they came up with the result that you didn't like.

MR. EISBERG: That's exactly what happened in Stolt.

THE COURT: No. That's not a manifest disregard of the law, to be able to take the rule and then do the proper analysis with the rule, and then end up with a result that you don't like. That's not what Stolt or any case stands for that proposition. There's got to be that they took a rule that they knew existed and they didn't apply that rule, they applied a different rule.

MR. EISBERG: Yes. And that's what happened --

THE COURT: So what was the different rule that they applied? That's what I'm trying to --

MR. EISBERG: The different rule that they applied here is that although they articulated, they articulated the New York choice-of-law analysis, just like in Stolt an analysis was articulated, in reality they ended up applying their own preference for which law they want to --

THE COURT: Where do I go to make that conclusion?

MR. EISBERG: Where you go is you --

THE COURT: Show me in this record where I could make that independent --

MR. EISBERG: In the record if you look at Exhibit M to the Toal declaration which includes the choice-of-law analysis that was done by the arbitrators. And if you look at the decision --

THE COURT: Exhibit?

MR. EISBERG: Exhibit M like mother.

THE COURT: You're pointing me to the decision.

MR. EISBERG: To the decision on the choice of law, yes. Or you could look at the Spray declaration Exhibit 12.

THE COURT: I'm sorry. Yes. Spray declaration, Exhibit 12.

MR. EISBERG: Yes.

THE COURT: So show me where they identified the wrong

rule of law, that I could conclude they applied the wrong rule of law.

MR. EISBERG: If you look at the bottom of page three and you see on the bottom of page three and the top of page four, the panel there is acknowledging that the New York choice-of-law rule is supposed to apply.

THE COURT: Well you're just being too vague to me. What language are you relying upon?

MR. EISBERG: "Both Abu Dhabi and New York have legitimate interests and concerns."

And right above that, "The parties chose New York as the seat of their arbitration and there's sufficient apparent conflict between the relevant law..."

THE COURT: Slow down. You can't do that. The court reporter. She only has three hands.

MR. EISBERG: "In addition, the parties chose New York as the seat of the arbitration and there is sufficient apparent conflict between the relevant laws of New York and the UAE Abu Dhabi to lead us to also apply New York's interest analysis."

THE COURT: So what's wrong with that?

MR. EISBERG: What is wrong with that is the panel then went on to manifestly disregard that those actual choice of --

THE COURT: Show me where they manifestly disregarded it and then I'm supposed to make that conclusion. Those are

just semantics. You can't just keep repeating it and that makes it so. That's a conclusion. Tell me on what facts you're basing that conclusion.

MR. EISBERG: This is what I'm basing it on. What I'm basing it on is that when you look at what the choice-of-law rules actually say and require.

THE COURT: Right.

MR. EISBERG: What the panel went on to do here is to disregard what those choice-of-law rules actually --

THE COURT: Where. Show me where they did that. Give me an example of that.

MR. EISBERG: Let me give you an example of that.

The default rule, right, in the choice-of-law rule is where the plaintiff is located and where the harm is felt, right.

And there is no question, if you look at what the panel found here, that that's satisfied, right. Abu Dhabi is where the plaintiff is located and it's also where the harm is felt.

THE COURT: Where am I supposed to look to see that they applied some other inappropriate test?

MR. EISBERG: Well if you look on page 3 and 4 and you look at the facts that were focused on by the panel.

THE COURT: Aren't those legitimate facts that should be focused on?

MR. EISBERG: These are facts that are legitimate. But the panel had to manifestly disregard what the choice-of-law rules say in the presence of --

THE COURT: What part of the choice of law did they manifestly disregard?

MR. EISBERG: The part of the choice-of-law rule that says when the plaintiff is located in Abu Dhabi and the harm is felt in Abu Dhabi, then if you look at -- if I could turn your Honor to another tab, which is tab C, it shows what the rule of law is. What it shows is -- and these are Citi's cases, not our cases -- in tab D, if you look at tab D, your Honor, Citi's own cases which are quoted on this hand-up show that the clear-cut rule -- and these are the words in their cases -- is that the law of the place where the plaintiff and where the injury is felt "almost invariably obtains" and "will almost always be determinative."

THE COURT: Well, wasn't there -- you can tell me if I'm wrong -- but wasn't there some discussion by the arbitrator with regard to that issue?

MR. EISBERG: Yes. And that was clearly --

THE COURT: So they did that analysis.

MR. EISBERG: This is where they went off the rails.

THE COURT: That's what I'm trying to figure out. Show me where they went off the rails.

MR. EISBERG: This is where they went off the rails.

If you look at how you're supposed to get around that default rule where the plaintiff is located and where the harm is felt, Citi's own cases -- and this is shown in tab D -- show that to get around that, New York's clear choice of rules say you need to have the overwhelming bulk of events in New York and you need to have the greater interest in New York.

THE COURT: But didn't they do that analysis. They said the greater interest was in New York.

MR. EISBERG: Yes. They mouthed that conclusion just like in Stolt-Nielsen.

THE COURT: Well, you say they mouthed the conclusion. What basis do I have to say that they mouthed the conclusion but there's evidence that they did something different than what they said they did?

MR. EISBERG: Because just like in Stolt-Nielsen, when you look at -- again, and Stolt-Nielsen said just because the arbitrators haven't said that they're substituting their policy instead of the law that doesn't make it so. They don't have to come out and say: I confess, I'm actually disregarding the law.

THE COURT: But bullet two on the bottom -- the second bullet on the bottom of page three is exactly what you say is missing. They say, "In our view the overwhelming center of the events giving rise to the claims is New York." And then they give you a whole paragraph of why they conclude that.

MR. EISBERG: And as Stolt-Nielsen said, the fact that --

THE COURT: They didn't just mouth it. They gave you the reasons why they concluded.

MR. EISBERG: Now let's do what Stolt-Nielsen did which is to go -- what Stolt-Nielsen did is it said well let's see, let's look at the reasons that the panel gave.

THE COURT: Right.

MR. EISBERG: And let's see if there's a colorable basis for the conclusion.

THE COURT: Your saying that there's not even a colorable basis to say that the alleged misrepresentations were made in New York and the substantial majority of the activities leading up to the signing of the investment agreement was in New York. Why isn't that consistent with what they're supposed to do?

MR. EISBERG: Because it lacks any colorable basis under the case law.

THE COURT: I don't understand what you mean by -- you're giving me semantics.

If you say I'm supposed to look at where the overwhelming center of events giving rise to the claim are, and I make a decision that it's New York, and I say it's New York because of A, B, C, D. And one of those factors is that's where they did the contract, that's where the majority of the

activities are, what else -- why isn't that -- why is that somehow inconsistent with the case law? Because that's exactly what I'm supposed to do. They articulated specifically why they say the overwhelming events, and they identify which events --

MR. EISBERG: And Stolt-Nielsen is clear it's not enough to identify it and say here is the reason.

THE COURT: So what else do they need to do?

MR. EISBERG: The basis, the conclusion has to be, respectfully, your Honor, not just articulated. Because it was articulated in detail in Stolt-Nielsen.

What you have to do is have an articulation of it that also does not strain credulity.

THE COURT: Why does it not strain credulity to say: I've looked at all these events. These people made the contract in New York. And I'm only using one -- two of the examples they use, and the overwhelming activities are here, and the choice of forum is here, and the choice of law on the contract is here. You can't credibly say that that analysis carries no weight whatsoever.

MR. EISBERG: Let's go through each of the factors like the court did in Stolt-Nielsen in detail.

The facts that the panel focused on, right --

THE COURT: Right.

MR. EISBERG: -- are, number one, they focused on the

facts that the misrepresentations were directed to and received in Abu Dhabi. So, specifically, what you were just mentioning --

THE COURT: No. They also -- they weighed both sides of the facts. They said it was at Abu Dhabi but they were made in New York.

MR. EISBERG: Yes. They say --

THE COURT: They did a balancing.

MR. EISBERG: Your Honor, absolutely. I'm not trying to hide from the fact. They said that there were representations that originated in New York and were sent to and received in Abu Dhabi.

THE COURT: All right.

MR. EISBERG: Like they say, the 10Q, and the Klein letter to Doshi. These are listed, if your Honor would look, these are on tab E.

THE COURT: And they are supposed to weigh them on both sides and then decide where the greater weight of the contacts are in their opinion. If they do that, you can't simply say well they gave them credit for ten things and gave us credit for eight and we think that that's wrong so it's a manifest disregard of the law.

MR. EISBERG: Your Honor, this is the error, the reversible error that the Second Circuit made. This is on one of the hand-ups. I want to get back to these facts because you

asked about it.

THE COURT: That's fine. But you're not clearly articulating exactly what it is that you say is deficient, factually or procedurally, about the analysis they went through. They may be totally wrong. And you and I may, if we had weighed those same factors, we may have come up with a different conclusion.

But I don't hear you saying well they were supposed to weigh the factor of where the representations were made and they didn't do that. You articulated to me that they -- name a factor that you say they should have articulated and considered that they did not articulate and consider. Just give me one example of one factor that you say they should have articulated and considered and it's clear that they did not articulate it and consider it.

MR. EISBERG: Your Honor, that is not what we're complaining about.

THE COURT: That's what I'm trying to understand, what you're complaining about, other than the result.

MR. EISBERG: In order for it to be a manifest disregard, you need for them to have considered it. You need to have brought it to their attention for them to consider it. So we're saying we brought it to their attention and they considered it. And the manifest disregard -- now the Second Circuit in Stolt said there can't can be manifest disregard

here because the panel looked at the various sets of laws and there was no preordained conclusion under those laws.

THE COURT: There is no preordained conclusion in this case either.

MR. EISBERG: Exactly. And the Second Circuit was reversed.

THE COURT: No. Not on that issue. Not on that issue.

MR. EISBERG: Respectfully, on that issue.

THE COURT: It didn't say that, no there was a preordained --

MR. EISBERG: The Second Circuit said there is no preordained conclusion. So there couldn't be manifest disregard and because there was some weighing and leeway that was allowed. And the Supreme Court said, at least when it comes to choice of law, the fact that there might have been some weighing --

THE COURT: Tell me what they should have done differently.

MR. EISBERG: It's on tab E, what they should have done differently.

On tab E what they should have done differently is when you look at -- and this lists out the facts in the decision by the arbitrators.

THE COURT: Right.

MR. EISBERG: They focused on the fact that all the misrepresentations were directed to and received in Abu Dhabi like, as your Honor said, a letter prepared in New York and sent to Abu Dhabi.

THE COURT: And you're not saying those are illegitimate considerations?

MR. EISBERG: No, no.

What I'm saying is even more than that, your Honor. When you look at that consideration, the phonecalls, the video presentation to Abu Dhabi, right.

THE COURT: Right.

MR. EISBERG: Under the clear case law -- and this is similar to what happened in Stolt -- under the clear case law, all of those facts are facts that trigger the clear default rule.

The rule in New York which is clear-cut is that when you have fraud originating in one place, projected like a missile into another place, and the harm is felt in that other state, that triggers the default rule that the place of the plaintiff and the place where the harm was felt --

THE COURT: So you're saying they shouldn't have done any other analysis other than that the place of the injury is in Abu Dhabi?

MR. EISBERG: No, no, no. Your Honor --

THE COURT: Well, there's not a default rule. You

call it a default rule.

MR. EISBERG: I do.

THE COURT: It doesn't mean that they have to do it that way and they're not supposed to do another -- a further analysis.

MR. EISBERG: Absolutely.

THE COURT: So you don't automatically get it simply because those are the facts.

MR. EISBERG: It's not an automatic.

THE COURT: So you still have to go through this analysis.

MR. EISBERG: Agreed.

THE COURT: So there is no such thing as a default rule.

MR. EISBERG: I'll call it what Citi's own cases call it, okay. What Citi's own cases call it and they're quoted --

THE COURT: That's the way they're supposed to start.

MR. EISBERG: I will just quote the cases to be safe here, if you don't like the word "default." I don't want to try to be tricky.

THE COURT: It depends on what you mean by default. If you mean by that that should have been the end of inquiry, I don't agree with you.

MR. EISBERG: No, your Honor. Agreed.

All I'm saying is that under Citi's own cases, which

are cited under tab D, what the courts have called it is this is -- where the plaintiff is located and where the harm is felt almost invariably obtains and almost is always determinative. That's what their cases say.

And what their cases also say -- these are their cases, their best cases, not my cases, not ADIA's cases.

On the bottom of page E, their cases that they cite for situations where courts have said you can around or to trump the -- I'm loosely calling it the default rule. Their own cases say -- and they're quoted there in black and white for your Honor to see -- the cases that they rely on that say sometimes you can get around the rule which almost invariably is determinative. What you need to show is that the overwhelming bulk of events took place elsewhere and that other place has the stronger interest.

THE COURT: But did they -- correct me if I'm wrong, because I've read a lot of papers here -- I don't think that they came to the conclusion that Abu Dhabi was the place where the loss was felt.

MR. EISBERG: Oh, they did.

THE COURT: Did they come to that particular --

MR. EISBERG: Yes, they did.

If your Honor looks at page three of the choice-of-law decision by the panel, which is Spray declaration 12, you see -- if you let me know when you're there, the last filled-in

bullet point towards the bottom.

In the penultimate bullet point, "ADIA the plaintiff is based in Abu Dhabi. ADIA's alleged injury took place in Abu Dhabi."

So there's just no question what I've loosely been calling the default rule what their case was called as the rule which is almost always determinative.

THE COURT: You don't -- I just want to make sure because I just want to know how far you're pushing this argument.

MR. EISBERG: Yes, your Honor.

THE COURT: Is it your contention that it would be improper for them to say the plaintiff is based in Abu Dhabi and the alleged injury took place in Abu Dhabi; however, in our view, the overwhelming center of the events giving rise to the claims is New York, are you saying that would be an improper analysis?

MR. EISBERG: I'm saying that in this case --

THE COURT: Well you've got to answer that question first.

MR. EISBERG: The answer --

THE COURT: Isn't that exactly what -- that's why you say you want to give me a default rule. Aren't they supposed to do it that way?

MR. EISBERG: What they --

THE COURT: Yes or no.

MR. EISBERG: Yes.

What they're supposed to do -- what they're supposed to do and permitted to do under the clear-cut case law is look and see, although that rule is almost always determinative, are there factors present that the case law has been crystal clear about needing to be present to trump what I have been calling --

THE COURT: And that's exactly what they just did and articulated here.

MR. EISBERG: Yes. Now, your Honor, here is the problem.

THE COURT: Where do I conclude they didn't do what they said they did in the manner in which they laid it out specifically?

MR. EISBERG: If I can answer that question, your Honor.

The Supreme Court and the Second Circuit in Halligan, which is also quoted in one of these hand-ups, has been very clear that the way that a court determines that this happened -- and by "this" I mean how can I see that the panel didn't really do what they were supposed to do -- the Supreme Court was very clear, and Halligan was very clear, and I have the quotes in the hand-up so your Honor can see it -- said here's what you don't have to do. You don't have to have an

arbitrator who says: I confess, although I'm articulating the legal principles, actually I'm ignoring it. They said even under the strictest view --

THE COURT: But where do I conclude that they ignored it. Show me in this record. When they articulated it -- I mean you're making the argument backwards. It's not a question of whether or not I'm sitting here and I believe them or not.

It's a question: Is there any evidence here to make me conclude that they didn't do exactly what they said they did in the manner exactly the way they articulated? Where is the evidence that they didn't do this actual analysis, if you concede that this actual analysis, if it was in fact done, is an appropriate analysis?

MR. EISBERG: Your Honor, respectfully under Stolt-Nielsen and the Second Circuit case law I believe that the test is not whether you can look and say: Did they not really do what they said they did, because it's always going to be the case it's on the page and so they did it. What the Second Circuit has said and what the Supreme Court has said is: When you look at what they articulated, is there a colorable basis or does the analysis strain credulity?

THE COURT: So I would have to conclude that this second bullet point and the reason why they say they've come to this conclusion that's in that entire paragraph is neither a colorable -- there is no colorable rational basis for them to

reach that conclusion based on those factors.

MR. EISBERG: Not only would you need to, your Honor, I would say that it's clear that when you dig into the case law, the cases that Citi cites, and when you dig into it in the way that the Supreme Court did -- and by the way, it's interesting to point out because people sometimes have different views of what manifest disregard means. The three-justice dissent, the dissent in Stolt-Nielsen said that in analysis done by the majority was so searching that the dissent said this becomes more like a de novo review.

I'm not saying it is a de novo review. But what I'm saying is that under Stolt-Nielsen they dug in, they looked at the case law. And they said listen we know that the panel cited the New York case law called Evans, and we know that they looked at twenty-one prior arbitration awards, and we know that they distinguished Second Circuit case law, and we see that they came to a conclusion and they distinguished a case called Bazzle, but that conclusion, the conclusion they drew wasn't colorable because the choice of law is extremely important, it affects everything.

And here, let me get back to why what they did is not colorable. If you look again on the hand-up E at -- hand-up E lists out the facts that the panel was focusing on when they were purportedly applying the New York choice-of-law analysis. And we've already spoke about that the e-mails and documents,

the phonecalls and video presentations that were projected into Abu Dhabi, under all the cases, those are factors that as a matter of law, as a matter of law trigger what I've been calling the default rule which is the fraud is originating somewhere else but hitting someone in Abu Dhabi and the harm is felt there. So there is no colorable basis to say that those trigger New York as the correct law.

THE COURT: But that's not what they relied upon. They didn't rely upon what happened in Abu Dhabi to trigger that. They relied on what was going on in New York to trigger that.

MR. EISBERG: Your Honor, under the cases it is manifest disregard, what you just said is clear-cut, clear-cut for the panel to disregard.

THE COURT: But they didn't disregard it. They considered it.

MR. EISBERG: But, your Honor, under the case law -- and this gets --

THE COURT: You keep saying "disregard." What do you mean by disregard?

MR. EISBERG: What I mean is that under all of the case law --

THE COURT: What do you mean by disregard? What do you say that they didn't do?

MR. EISBERG: That their analysis had no colorable

basis and strains credulity when you look at --

THE COURT: So you disagreed with their conclusion.

MR. EISBERG: It's not that I disagree with their conclusion.

THE COURT: You don't say that there's anything improper about weighing those factors. You're just saying that they gave them the wrong weight.

Do you say that any of these cases stand for the proposition that they should have ignored the New York activity in making this analysis?

MR. EISBERG: No, I'm not. I can't.

THE COURT: Well, you can't. Right. You can't.

MR. EISBERG: I didn't, your Honor.

What I said is that the cases are all clear that when there's a particular type of activity in New York, which is the fraud originates in New York, and the impact is felt elsewhere, that just triggers what their cases say is invariably and almost always determinative.

THE COURT: But you just said that that's not the end of the inquiry.

MR. EISBERG: Now let's get to what the other part of the inquiry is and how it was also manifest disregard and there was no colorable basis; again, just like in Stolt when they looked and said you can't just look at different sets of laws and say I did it and so you're immunized.

When you look at what the panel did to get around the default rule, they said: Well, there's also -- there was no in-person -- nobody from ADIA ever came to New York. And they said well there was a planned meeting in New York and ADIA said weather is bad.

THE COURT: So the meeting got canceled.

MR. EISBERG: And so when you look, the fact that all of the in-person meetings -- and, again, this is when you look at the case law, that, again, weighs in favor only of Abu Dhabi.

THE COURT: But you're talking about the weight. Not its proper consideration. You're not saying it shouldn't be considered. You're arguing that they shouldn't have given it the weight that they gave it. Those are your arguments.

MR. EISBERG: What I'm arguing is not the weight of the evidence and I'm not challenging the finding of fact.

THE COURT: But you are. You just said that that shouldn't be given weight.

MR. EISBERG: No, no, no.

What I'm saying is that under the case law, as a matter of law -- and again, choice of law is reviewed de novo. When a district court makes a decision, it's reviewed de novo. It's not a matter of weighing the evidence. There are right answers and wrong answers on this.

What I'm saying it's not a matter of weight. I'm

saying under the clear-cut case law each of these facts only can be looked at as triggering the choice of law that requires the application of Abu Dhabi law.

And, and on top of that, on top of that, your Honor, when -- again, this is listed on the hand-up -- all of the factors that they looked at, and you say to yourself under the legal test, under the legal test, does this point to Abu Dhabi or New York? Every one, under the legal test, points to Abu Dhabi.

THE COURT: Not every one.

MR. EISBERG: Which one, your Honor?

THE COURT: The fact that there are negotiations and activities in New York doesn't point to Abu Dhabi.

MR. EISBERG: Your Honor --

THE COURT: That's not a logical argument to make.

The New York activity does not point to Abu Dhabi.

Now, if you want to say there's greater Abu Dhabi activity than the New York activity, you may or may not be right. But I know that that's not the way you're saying that I'm supposed to review their decision.

MR. EISBERG: Just to be clear. The fraud claim here has nothing to do with any negotiations or discussions in New York.

THE COURT: That's not what they -- that's not the facts that they found.

MR. EISBERG: Respectfully, your Honor --

THE COURT: They said the statements were made, the original false statements were made in New York.

MR. EISBERG: Yes. False statements projected into Abu Dhabi. And that's the -- that's what the clear-cut -- look, the choice-of-law rules -- the choice-of-law rules are there, to some degree, to give foreign litigants some predictability about what's going to happen here. And there's a body of case law, and Citi's cases cited it, that make clear that that's the classic scenario. And to say that a representation was projected from one place to the other and that triggers a way to get around what I've been calling the default rule, the case law just does not support that.

THE COURT: Let me move you to another issue that's related to that. Because I think -- and you can convince me and you don't have to meet both of those burdens -- but you first have to convince me that the process of the analysis that they went through was illegitimate. And as we both agree, it's not whether they came up with the right result, and the issue isn't whether or not they identified the standard that they were supposed to use. You say there was something inherently deficient in the process that they used to come up with the right or wrong decision on the choice of law.

My second question with regard to the choice of law. What is it about -- and I'm still searching and I have more

searching to do -- but what is it about what they found that the facts were that you say would have made you win under the Abu Dhabi law when you lost under New York law?

MR. EISBERG: There's an enormous amount, your Honor.

THE COURT: Give me the best one you got.

MR. EISBERG: Yes.

For example, let me focus you on one particular fact. In the opinion, the panel found expressly that ADIA made at least a colorable showing that Citi made some omissions of fact, material fact, by speaking incompletely and ambiguously, at least a colorable case. But then the panel went on to say that under New York's law which implies a duty to disclose, right.

THE COURT: Right.

MR. EISBERG: New York says you can stay quiet if you don't have a special relationship.

Your Honor, I'm not going to go into more detail about the -- I'm not going to say anymore about it now.

MR. FAGEN: It's a sealed order, your Honor.

MR. EISBERG: It's a sealed order.

THE COURT: That's not where I'm going. I need you -- look, it seems to me that the tribunal made a factual determination. And that factual determination was that there was no deliberate or reckless material misrepresentation or omission at the time these statements were made.

Given that factual finding, what Abu Dhabi law would give you the right to recover when the facts are that they didn't make a deliberate or reckless material misstatement or omission?

MR. EISBERG: A lot of Abu Dhabi law.

THE COURT: Tell me the law.

MR. EISBERG: Tab G.

THE COURT: Quote the Abu Dhabi fraud law that gives you a right to recover based on those facts.

MR. EISBERG: Tab G, your Honor. It's listed out.

THE COURT: That you just gave me?

MR. EISBERG: Yes. Tab G look good.

So if you look at item two, for example. Under New York, scienter is required in order to prove fraud and succeed or at least a reckless disregard.

Whereas, under Abu Dhabi law, it's enough to show that a defendant acted wrongfully or unreasonably in making a misrepresentation that ultimately turned out to be incorrect.

THE COURT: What is the evidence in this record or conclusion by any decision of the tribunal that would lead -- or factual finding that would support your position that they acted wrongfully and unreasonably?

MR. EISBERG: Your Honor, under Abu Dhabi law, if you point to the fact that ten days before, Citi took -- I'm going to get a little bit into the -- can I approach?

THE COURT: No. No. Because that's not this thrust of my question.

My question is: If they did not make a material, a deliberate, a reckless material misrepresentation or omission, in what way do you say that this decision says that they committed some act that was wrongful or unreasonable? What's the fact in this decision on which you base that?

MR. EISBERG: I was giving you one example which is that --

THE COURT: Is it in the decision?

MR. EISBERG: Yes.

THE COURT: Show me where. Just tell me what page it is.

MR. EISBERG: Page 70, the top of page 70.

THE COURT: Are we still dealing -- I don't want to make it awkward for you with regard to confidential information.

MR. EISBERG: I can approach.

THE COURT: No. Just tell me. Point me to the paragraph.

MR. EISBERG: Page 70 at the top.

THE COURT: The top paragraph?

MR. EISBERG: Yes. And in the middle where it says we think that ADIA has at least a colorable argument.

THE COURT: Where is it that Abu Dhabi says that you

win if you have a colorable argument? You never say that's Abu Dhabi law.

MR. EISBERG: No, no.

THE COURT: I assume that's not Abu Dhabi law. You won't win if you have a colorable argument.

MR. EISBERG: No, no.

But what happened here is the panel said here that they are rejecting our at least colorable argument about nondisclosure because, and it says it right here, it did not satisfy New York's duty to speak.

THE COURT: I know. But what is it about these facts that you say are presented here that satisfies Abu Dhabi? That's what I'm trying to say.

You keep saying because it's wrongful and unreasonable. But there's nothing here that indicates that there was any wrongful or unreasonable act.

MR. EISBERG: Your Honor, the fact --

THE COURT: There is no conclusion -- there is no factual determination.

MR. EISBERG: Well, that didn't happen because the arbitrators refused to apply Abu Dhabi law, didn't allow us to have experts come in and say I'm an expert on Abu Dhabi law, let me explain to you.

THE COURT: That may have been part of the reason of the lateness of your application.

MR. EISBERG: With all due respect, your Honor, I don't believe -- I can address that. But I believe that it was not late. And also that under the case law it would be error to try to look at that as a factor against us in deciding this.

THE COURT: Don't you agree that you cannot simply say that now in hindsight that they didn't let you use Abu Dhabi law so you couldn't establish the record of the wrongfulness?

You have to show me that they didn't apply not only the first burden of showing me that they should have applied Abu Dhabi law, but you have to show me something in this record where I could make a conclusion that you would have won instead of lost.

MR. EISBERG: We would have.

THE COURT: Where?

MR. EISBERG: These are the places.

In the decision, in the award, the panel said we're giving weight to the fact that ADIA has sophistication. And sophistication can negate reliance.

THE COURT: So?

MR. EISBERG: So under Abu Dhabi law you can't do that.

They said that --

THE COURT: Don't tell me what you can't do under Abu Dhabi law. Tell me what you establish in this record that was the wrongful or unreasonable act that you say would have given

you relief under Abu Dhabi. Just characterize for me what was the wrongful or unreasonable act that you're saying that would have made you win even though you established it here and you only lost because they applied New York law.

MR. EISBERG: Days and weeks after -- just days and weeks after taking seven-and-a-half billion dollars from ADIA, it turned out that three critical representations were not just wrong but were wrong by billions of dollars. And we put in evidence that at the time -- at the time that these statements were made, it was unreasonable -- it was unreasonable for those statements to be made. For example --

THE COURT: What in this record would say it's unreasonable for those statements to be made if the arbitrators concluded that nobody who made a statement to you knew of that information, or utilized that -- or should have known of that information when they made the representation?

MR. EISBERG: That's an excellent example of a burden that wouldn't have existed under Abu Dhabi law. Because under Abu Dhabi law -- under Abu Dhabi law where all you have to show is that it was unreasonable to have --

THE COURT: Explain to me what the evidence of unreasonableness -- are you just talking about proximity of time?

MR. EISBERG: No, your Honor.

THE COURT: So what is unreasonable about -- what

would be unreasonable about me telling you something on Monday and genuinely believing it's true and then the facts change or it turns out on Tuesday it's not the way I thought?

MR. EISBERG: Under Abu Dhabi --

THE COURT: Under Abu Dhabi law. I assume you can't recover on those facts.

MR. EISBERG: I wouldn't -- I don't think it's fair to start assuming about Abu Dhabi law.

THE COURT: What do you mean by Abu Dhabi -- I have to assume -- if you're saying that that's the thing made you lose the arbitration because they didn't apply Abu Dhabi law. And you're saying to me because they applied --

MR. EISBERG: Yes.

THE COURT: -- simply that as long as you prove that the defendant acted wrongfully or unreasonably you should have won on your fraud claim --

MR. EISBERG: Yes, for example --

THE COURT: -- then you have to tell me what is the evidence in this case that you would have won on. And your response is well we never really got to develop that because they never gave us the opportunity to do that.

If that's your argument, I understand it.

MR. EISBERG: That's part of it.

THE COURT: But your argument would be stronger if you said: Look, this is the wrongful act. They knew it. The guy

down the hall knew it. He walked in his office and he says: Hey, what do you think of these numbers? I'm getting ready to tell Abu Dhabi.

And he says: Well, you might want to tell him that but between you and me I'm not so sure that those are the right numbers.

I might be able to say that that's evidence of wrongfulness or unreasonableness if he walks in here and does it. But you don't say there's any evidence in this case --

MR. EISBERG: I do.

THE COURT: -- that would support that claim.

MR. EISBERG: Yes, I do, your Honor.

THE COURT: Then give me the factual -- give me the fact that you say you established that that fact would have inevitably led to your winning under Abu Dhabi law as opposed to losing under New York law.

MR. EISBERG: There are several examples.

THE COURT: Give me the best one you got.

MR. EISBERG: Transparency letter. The transparency letter is a letter that was given by a top executive to Abu Dhabi. And the transparency letter literally said we have been transparent about our financial conditions and our plans -- I'm not quoting now, but this is the gist.

THE COURT: No. I remember that.

MR. EISBERG: And we don't know of anything that we

need to tell you that would change the impression that we've given you.

And the panel specifically found -- Citi argued that can't possibly mean that that letter means that they're saying everything and anything that has to do with Citi's financial condition would have to be updated as of that date. That can't be what it actually means. That's too broad to read it that way.

And the panel said actually, yes, that's what that letter means.

Under Abu Dhabi law, under Abu Dhabi law we believe it's a slam dunk case where the standard --

THE COURT: Show me where you're getting that from. Why is that under Abu Dhabi law? You've quoted no Abu Dhabi law to me that stands for that proposition.

MR. EISBERG: The Ahnish declaration at paragraphs 8 and 13 -- and that's cited in tab G of the handout -- which says that all you need to do is show that the defendant acted wrongfully or unreasonably in making a representation that was ultimately incorrect.

THE COURT: But that's not -- we're going in circles. You need to tell me why that is evidence of wrongful or unreasonableness.

MR. EISBERG: Your Honor, first of all, with all due respect --

THE COURT: What was wrongful about that?

MR. EISBERG: What was wrongful is to give someone a letter that says we've been totally transparent and everything that we're telling you, there's nothing for you to worry about.

THE COURT: Okay. If they generally believed that, you say that was wrong?

MR. EISBERG: Genuine belief. That's scienter. That's required under New York law.

THE COURT: In what way is it wrongful? You're not saying wrongful means that I turned out to be wrong? That's not the definition, I assume, under Abu Dhabi law of what wrongful or unreasonable means.

What is unreasonable about me saying that I've been transparent with you if I really think I've been transparent?

MR. EISBERG: Because under Abu Dhabi law you can conclude it was unreasonable to give this without having taken more care to make sure that what you were saying actually was correct and wasn't --

THE COURT: But that's reckless and negligent?

Why is that different than a New York standard? Without recklessness or negligence you don't have a fraud claim, even under Abu Dhabi law, if you're defining unreasonableness -- unreasonable -- how do you define unreasonable under Abu Dhabi law?

MR. EISBERG: Your Honor, this is exactly the chance

that we were deprived of in the arbitration.

THE COURT: I understand that.

So your argument is not we have a case on this record that is the winning case under Abu Dhabi law, that the record supports a winning case.

Your argument is we didn't get the opportunity to present or discover the winning case because they cut us off at the pass.

MR. EISBERG: It's both.

And the reason that I say that it's both is that the questions that you're asking now, these are questions that under Abu Dhabi law, were this vacated, and there was an opportunity that we never got, I believe the answers -- and, again, we've given you the affidavits and I hope that you'll go back and look --

THE COURT: You've given me the questions, not the answers. You're right.

You say that it raises these questions about if you had had the opportunity, you would have done. You don't point to any actual finding or evidence that would a constitute successful claim under Abu Dhabi law.

MR. EISBERG: Two things on that.

What the Supreme Court said in Stolt-Nielsen is that on a motion to vacate, if the result is clear --

THE COURT: Right.

MR. EISBERG: If the result is clear, then what the Court should do is just not only vacate but should also say this is what the result has to be on choice of law.

Another option, your Honor, if after you look at the affidavits we put in on foreign law, if the answer is not clear -- and the Supreme Court says this in Stolt-Nielsen -- then it gets remanded to the arbitrators so that we have a chance to prove our case under the correct law instead of a situation where it's like an umpire has the wrong rulebook and balls aren't balls anymore and strikes aren't strikes anymore and you're sitting here saying I know that they were using the rules of football, just recreate for me what would have happened.

What Stolt-Nielsen makes clear is -- again, choice of law is like almost every other decision. And even though Citi says it involves some, what they call discretion, it certainly is reviewable. It's reviewable in a searching way. And when you get it wrong, if you can't by looking at it say I know what the right answer is, what Stolt-Nielsen says is well then at least you send it back so that the correct law can be applied.

THE COURT: And this argument is limited solely to your fraud claim.

MR. EISBERG: This is limited to our fraud claim.

THE COURT: Because you concede that, and you have to concede that the choice of law provision with regard to any

breach of contract definitively says New York law.

MR. EISBERG: In fact, I would go -- I would say yes and further than that. The choice-of-law clause is clear that not only does New York law apply to the contract claim. It's very clear that New York law has not been chosen to apply to the fraud claim.

THE COURT: Do I have that? I was looking for that language, and I didn't have time to find it. Where is that?

MR. EISBERG: I'll find you the cite, your Honor. And also find you the cite in the panel's opinion.

But what the panel looked at and what the panel understood is there are two different types of choice-of-law clauses. One type, which is very standard, as your Honor knows, is a choice-of-law clause that says this agreement and its enforcement will be governed by New York law -- and then here comes the kicker -- without regard to choice-of-law principles. This was difficult --

THE COURT: Was not that.

MR. EISBERG: Because it omitted that last piece.

THE COURT: I understand.

MR. EISBERG: And as the case law recognizes and as the panel recognized on Exhibit 12, page 1 to 2, the type of clause here clearly said: Hold on a second. New York will apply to the contract claim only, only, only. We are not selecting New York law to the tort claims.

THE COURT: So I mean you have no where to go on the breach of contract claim.

MR. EISBERG: Well, we have somewhere to go on the breach of contract claims if it gets vacated.

THE COURT: Why? What was wrong with that determination?

MR. EISBERG: Your Honor, I'm not -- I'm not challenging --

THE COURT: That's what I assumed -- I'm not assuming. That's what you're saying.

MR. EISBERG: I say it and let me say it again so it's clear. I'm not challenging the contract.

THE COURT: You don't claim that there was anything improperly applied there, that there was the wrong law applied. You don't have a colorable argument to make to me that the arbitrators did not have a sufficient basis, whether you agree with it or not, but didn't have a sufficient legal basis and didn't do what they needed to do with regard to the contract claim that you were bringing the other side. They were supposed to apply New York law. They applied New York law. Unfortunately for you, you lost. You can dig and dig and dig. If it was only the contract issue, we wouldn't be standing here. You're hanging your hat on a separate tort fraud claim outside of the contract.

MR. EISBERG: It was a fraud claim outside of the

contract.

THE COURT: I'm assuming the best way to characterize it -- and we'll take a lunch break because I want to give you all a full opportunity to be heard because I know how important this is -- but I assume that the best way to really characterize that claim is that it is akin to a fraudulent inducement claim.

MR. EISBERG: You're talking about the fraud claim?

THE COURT: I'm talking about the one that's at issue here. Is there anything else at issue here?

MR. EISBERG: We pled that it was a -- it was a fraud claim.

THE COURT: Fraudulent inducement. Fraudulently induced you to make the investment.

MR. EISBERG: That is one type. But it was not limited --

THE COURT: That's what I'm trying to understand. What's the nature of the other fraud claim other than a fraudulent inducement to enter into the contract?

MR. EISBERG: The nature of the fraud claim included, for example, the transparency letter that they presently knew, they presently new information --

THE COURT: How is that a separate claim?

MR. EISBERG: We had a number of claims. It was not just fraudulent --

THE COURT: What factual scenario are you -- the damages you say you suffered is because it made you decide to give them your money.

MR. EISBERG: Your Honor, that --

THE COURT: So that's the fraudulent inducement claim. How is that a different claim?

MR. EISBERG: If we could, during the lunch break I'll look at what the pleading actually said just to make sure I don't say something --

THE COURT: I just never understood how you had more than one different type of fraud claim. And it didn't strike me as anything other than a fraudulent inducement claim related to that's what made you enter into this contract and give them your money because they made these misrepresentations. And if they hadn't made these misrepresentations, you would have never done the deal. I didn't know that this was any other dispute other than that.

MR. EISBERG: That's definitely part of it. If I could right after lunch I will look at the pleading.

If I could say one more thing before the lunch break, your Honor.

THE COURT: Sure.

MR. EISBERG: I just want to talk about just how important this was and why Stolt-Nielsen was clear that there has to be a searching manifest disregard when it comes to

choice of law not a rubber stamp type analysis.

If you would turn to tab G, the one that we were looking at before, we see that the panel's manifest disregard of Abu Dhabi law made all the difference in the world in the way that the panel decided this case.

Number two shows that under Abu Dhabi law ADIA did not need to prove scienter. Liability could be proved simply by showing that Citi wrongfully or unreasonably made a representation that turned out to be false.

Item number 3 shows that Abu Dhabi law wouldn't let Citi use sophistication as a defense to reliance.

THE COURT: But you never got to reliance here because the determination was made that they didn't make a false misrepresentation.

MR. EISBERG: Your Honor, it would not have needed to be an intentionally false misrepresentation for us to prevail under Abu Dhabi law.

THE COURT: I know. But your reliance argument, the Court never determined that you lost because there was no reliance.

MR. EISBERG: Actually, they used sophistication as a reason for rejecting our claim. I can get you the page cite for that, but they did.

THE COURT: I'll look at it again. But the way I remember it is they commented and concluded that you were

sophisticated so you didn't rely. But reliance is irrelevant once they say that there was no false misrepresentation --

MR. EISBERG: But here's why it matters.

THE COURT: -- reckless or deliberate. Reliance doesn't matter.

MR. EISBERG: But in terms whether we would have won under Abu Dhabi law, you didn't need either of these things. And so if you showed an unreasonable statement.

THE COURT: Right.

MR. EISBERG: Sophistication wouldn't have mattered. And so it would have driven the outcome.

THE COURT: So you still haven't told me in what way the statement was unreasonable or wrongful. I can't articulate that for myself. I hear you saying it and you wanted to prove that, but I can't get my hands around what was wrongful about the statement that the arbitrators said was not deliberately or recklessly false.

MR. EISBERG: We had evidence in the arbitration that internally Citi had numbers and data available to themselves showing higher likely subprime losses than what they told ADIA.

THE COURT: And what was wrongful or unreasonable about that that's different than reckless?

MR. EISBERG: With all due respect, a New York lawyer sitting in New York or more importantly a New York federal judge might say that doesn't sound wrongful to me. But under

Abu Dhabi law, this is a type of a situation if you can show there was information internally at Citi, and that information showed a higher range of likely subprime losses.

THE COURT: But you didn't prove that. The arbitrators specifically addressed that issue. You didn't prove that anybody that made any representations had such knowledge.

MR. EISBERG: No, no. We did.

THE COURT: Who?

MR. EISBERG: We'll get you the page cite on the break.

THE COURT: They made the conclusion that someone who made a misrepresentation had that knowledge?

MR. EISBERG: They made the conclusion that those --

THE COURT: You've got to give me a yes or no first. The answer to that is no.

MR. EISBERG: You know, the answer to that is I don't know.

THE COURT: They did not -- I may be wrong.

MR. EISBERG: No, no. I'll check. You're asking whether the speaker individually --

THE COURT: Right.

MR. EISBERG: -- knew about the lower set of numbers.

THE COURT: That would make it unreasonable or wrongful if they made a statement contrary to that and they had

that knowledge.

MR. EISBERG: I will --

THE COURT: I can't even imagine under Abu Dhabi law you could say a person who makes those statements, without that knowledge, that because the janitor down the hall has the knowledge, that's somehow wrongful or unreasonable.

MR. EISBERG: Now, the question is under Abu Dhabi law, even if the speaker -- because remember scienter is a requirement that is different, doesn't exist like it does in New York.

THE COURT: Right.

MR. EISBERG: So especially because of the transparency letter that said: Listen, what we're telling you is all accurate, there's nothing else you need to know. Under Abu Dhabi law, and again we cite the Ahnish declaration --

THE COURT: No. That's not true. I can't accept that proposition.

Scienter might be the way that it is wrongful or unreasonable. It could be. So if it's not scienter then you have to articulate for me in what way it was wrongful and unreasonable if there's no scienter.

That's what I'm trying to get you to think of one for me. And you keep saying: Well, somebody had a transparency letter and they said, you know.

That's not a very strong point.

MR. EISBERG: An obligation -- you could easily under Abu Dhabi law, and again we put in the Ahnish declaration, easily find that when you have a top executive giving a transparency letter and when you have a different set of numbers --

THE COURT: But you didn't prove that.

MR. EISBERG: No, no.

The different -- I'll check. But assuming we didn't prove that the individual making the statement knew of the different set of numbers, under Abu Dhabi law you could conclude it was unreasonable for the speaker not --

THE COURT: Why? What basis do you have to say that?

MR. EISBERG: Because the affidavits we put in under Abu Dhabi law make clear that you don't have to have --

THE COURT: Don't tell me what you don't have to have. Tell me what you do have to have. That's what's important. Your arguments are backward.

I'm not concerned about what you don't have to have. Tell me what you have to prove. You have to prove that it was either unreasonable or wrongful for him to have made this statement.

I want you to articulate for me if you can. That will be critical to your argument. In what way do you say that the evidence indicates it was wrongful or unreasonable if it was not wrongful and unreasonable because there was scienter.

MR. EISBERG: Here's how. I can be blissfully ignorant when I sell you a car that the engine doesn't work.

THE COURT: I'm not talking about in the abstract. I'm talking about in this case.

MR. EISBERG: In this case. In this case. The speaker --

THE COURT: What are the facts?

MR. EISBERG: The facts are that --

THE COURT: That you should have won on. In Abu Dhabi.

MR. EISBERG: The facts are there was information inside Citi showing that the representations that were being made to ADIA were wrong and under Abu Dhabi law it could be concluded that it was unreasonable not to bring that information to the attention of the speaker.

THE COURT: Why?

MR. EISBERG: It was wrongful -- because it's wrongful and unreasonable.

THE COURT: In what way in this case? There is no evidence that that, in fact, was the case.

MR. EISBERG: No, no. There is evidence.

THE COURT: What is the evidence that somebody had that knowledge and didn't -- who are you saying at Citi bank had that knowledge and didn't give it to the person who should have given it to the speaker?

MR. EISBERG: Your Honor, over the lunch break I'll get you the page cite because this information was there. And the key is because of the wrong choice of law it was judged against the wrong standard.

THE COURT: Let's take the lunch break. Why don't we say 2:20. And then we'll continue.

(Luncheon recess)

THE COURT: We can continue.

MR. EISBERG: Thank you, your Honor.

There were a couple of things that I said that I would look into on the lunch break. One is that your Honor is correct that the claim was a fraud claim, a fraudulent misrepresentation claim, a negligent misrepresentation claim. So the way that your Honor characterized it was, in fact, accurate. That's one thing that I wanted to look at over the break.

Does that answer your question?

THE COURT: That does answer my question.

The other question -- I don't think the parties addressed it -- but if you have a contract that says you're supposed to apply the contract law of New York and it is determined that there was no breach of contract, how do you have a separate tort?

MR. EISBERG: Well under the law of New York you can have a claim for fraudulent misrepresentation regardless of

whether the contract was breached. You don't need to -- you could have a contract that you completely honored but the claim is listen I was fraudulently misrepresented into a document that included obligations that neither side ever would have had but for the fraud.

THE COURT: How would that not be a breach of contract?

MR. EISBERG: Under New York case law it's clear that you can have representations that are collateral to the contract.

THE COURT: Right. You don't claim there are any representations collateral to the contract.

MR. EISBERG: No, no. They certainly are. We do.

THE COURT: Which representation that you relied upon to your detriment that were collateral to the contract?

MR. EISBERG: The three key representations about the SIVs, was not taking on the obligations of the SIVs, that there was only a certain amount of capital --

THE COURT: Even you argue that that was central to the contract. That wasn't collateral to the contract.

You said that was a breach of contract, making that misrepresent, right?

MR. EISBERG: No.

Your Honor, this is not even something that the panel -- to the extent that the panel looked at this, this was

not viewed as a bar to our claim.

THE COURT: What was the breach of contract that was different from the fraud? That's what I'm saying.

MR. CALAMARI: Your Honor, if I could?

There has been a little confusion. The case presented to the arbitrators was essentially a case for fraud and negligent misrepresentation. There was only one minor breach of contract claim in the case and that related to certain warranties that were in the contract that dealt with some -- I'm not sure of the numbers but some numbers that were incorrect in being supplied.

This was never a case about breach of contract. It was always a fraud case right from the beginning. There were several different events of fraud. The fraud events were all collateral to the contract, as Mr. Eisberg said. There were certain documents and representations that were made to ADIA in order to induce them to sign the contract that ultimately provided for the acquisition of the stock.

The case is very similar in allegations to fraud cases that were the subject of class actions here in New York that were just settled.

But breach of contract has essentially nothing to do with the arbitration or the arbitration decision.

THE COURT: It's not really determinative. But I'm just trying to understand the content. Because it seems to me

that the whole obligation to arbitrate arises out of the contract.

MR. CALAMARI: That is correct.

THE COURT: There is no -- even you argue that the tort claim -- now, again, I haven't found the exact language yet that talks about the application of law, the forum selection clause and the law selection clause. But you have -- no, I shouldn't say that.

I thought that there was an obligation to arbitrate a dispute over the contract pursuant to the contract obligation. I didn't know -- maybe -- it may not be here or there. But I didn't think that the contract itself was some contractual obligation to arbitrate fraud.

MR. CALAMARI: There are two separate clauses in the contract: One that dealt with choice of law, a separate clause that dealt with dispute resolution. The dispute resolution --

THE COURT: Dispute of a contract.

MR. CALAMARI: Any dispute. The dispute resolution dealt with disputes arising out of the relationship.

The choice-of-law clause chose New York law to govern a contractual dispute. So the Abu Dhabi Investment Authority was in the position of agreeing to arbitrate any dispute in New York but it did not necessarily agree that -- and it did not necessarily -- it did not agree that New York law would control those disputes except to the extent that the dispute

related to the interpretation of the contract.

The arbitration was always about torts. And I don't think we'll get a substantial disagreement from my opponents. The arbitration lasted a month and it involved a substantial amount of evidence and a substantial amount of record. If a half-hour was devoted to contract claims, it would be a lot. There was a contract claim in the ultimate request for relief, but it related to one specific warranty that was allegedly breached. And the arbitrators found that that warranty was not breached.

THE COURT: Well, again, I have to -- the claims that -- I mean I have to look at it more carefully. But the claims that the arbitrators said that they were considering were common law and securities fraud, negligent misrepresentation, that induced the party to enter into the agreement, breach of fiduciary duty, breach of contract, and breach of covenant of good faith and fair dealing.

MR. CALAMARI: Yes.

THE COURT: You're saying that it's only the first two, common law, fraud, and negligent misrepresentation that were the heart of the subject of the dispute.

MR. CALAMARI: Yes. I am saying that, your Honor. The subject of the dispute principally centered around, as Mr. Eisberg has said, three specific misrepresentations that were made. And from ADIA's perspective, and ADIA contended in

writing to ADIA in order to induce them to sign these particular agreements.

THE COURT: Okay.

MR. CALAMARI: And that's why the choice of law analysis should center around a tort choice-of-law analysis. It's why many of the points that the arbitrators made in establishing contacts have very little or nothing to do with the points that they should have been looking at to evaluate a tort claim choice of law.

But putting that aside, the arbitration was essentially about fraud, negligent misrepresentation. And as Mr. Eisberg has pointed out, the standards for fraud, the defenses available for fraud are very different under Abu Dhabi law than they would have been under New York law.

And it poisons the entire arbitration because it tries the case against the wrong standards. It evaluates the evidence against the wrong standards. And it results in an unfairness that's beyond simply well, you won and you lost. When you have a party who is not present in the U.S. at all, who has no people here, no employees here, and they agree to resolve disputes here, they expect that the resolution of those disputes will be done in a manner that's fair, takes into account their customs, their practices --

THE COURT: Not necessarily. Not necessarily.

It depends on what you say the intent of the parties

were. If I want to look at the intent of the parties. The only thing I know about the intent of the parties is that they intended to resolve any dispute over this contract in New York under New York law. That's the only thing that expressly reflects their intent.

So if anything -- you know, it's not your strongest argument to say that I should look at the dealing of the parties and conclude -- or they should have concluded that everybody expected it to be Abu Dhabi law.

No. The only thing everybody expected if there was a dispute over -- if it was a contractual dispute over the enforcement and obligations of this contract, it was going to be a New York arbitration applying New York law.

MR. CALAMARI: No. I agree with your Honor.

THE COURT: I don't know -- where am I supposed to look as to the intent of the parties beyond that with regard to a, quote, tort?

Because quite frankly, look, the reality is, is that in the real world neither party were contemplating a tort action when they signed the contract. And they were contemplating a contract dispute. That's what a contract is for. And that's why the contract says that we're agreeing to arbitrate those disputes that arise out of the contract.

I'm not sure you can tell me that there's some place I'm supposed to look to say that this is evidence that the

parties intended to resolve a -- even though they have a contract dispute in which they agreed that they're going to resolve in New York under New York law, there's some evidence that what they really meant if they have a tort dispute they're going to resolve the tort under Abu Dhabi law. No way I can find that.

MR. CALAMARI: Your Honor is absolutely right. You do not intend to be defrauded, nor I'm sure does the other side intend necessarily to commit fraud although fraud is an intentional act.

THE COURT: Yes, but you intended that that dispute would be resolved in New York.

MR. CALAMARI: In an arbitration, an international --

THE COURT: In New York.

MR. CALAMARI: Located in New York.

THE COURT: In New York. Not Abu Dhabi.

MR. CALAMARI: Located in New York. But an international arbitration. The forum, the place where that arbitration should be wholly neutral to the parties coming in, that forum could have been Singapore or it could have been London. The result ought to be the same wherever the forum was, because --

THE COURT: I agree with that.

MR. CALAMARI: Because wherever the forum was --

THE COURT: You may be right in your clients' mind

that your client intended to apply Abu Dhabi law if a tort dispute arose. But there's nothing in this record for me to find that there's any evidence of that.

MR. CALAMARI: I totally agree. That's why there's a choice-of-law analysis that applies and that's where the arbitrators just totally got it wrong. And the law is, as Mr. Eisberg has said -- and I'm going to try to sit down and let him talk, I wasn't supposed to be talking -- as Mr. Eisberg said, the arbitrators simply got it wrong and they got it wrong because they wanted to apply the law that was convenient for them, not the law --

THE COURT: What basis do I have to conclude that, that they wanted to apply the law that was convenient to them? What evidence am I supposed to make that conclusion.

MR. EISBERG: Your Honor, they -- in the opinion, not surprisingly, the arbitrators did not come out and say that they were going to just do what was convenient for them.

But what I can tell you is, if you would turn to tab F of the hand-up, we note there that Citi expressly urged the panel that they should choose New York law and that they should not choose Abu Dhabi law. And they specifically said that a reason for this was that it would be more convenient. I will give you some quotes.

THE COURT: Why is that evidence that the arbitrators made such an erroneous determination?

MR. EISBERG: Because when you -- it's the combination --

THE COURT: Did they grant that application on that basis?

MR. EISBERG: They did not. You're correct. They didn't come out and say Citi we're agreeing with you -- what Citi said is that Abu Dhabi law is in Arabic. So they said it would be "obscure to the arbitrators" and it would "require translators and experts." And Citi told the panel -- this is a quote -- significant problem that the panel could solve by applying New York law.

You're right, your Honor, I don't want to overstate it, that the panel came out and confessed and said that's what I'm doing. But that's not necessary under Stolt-Nielsen where the Supreme Court said you don't have to actually come out and say I'm applying my own policy.

THE COURT: Stolt-Nielsen -- I don't know what section of Stolt-Nielsen you're quoting. I've read all of the cases over lunch for those propositions that you're reciting them for and I don't see that specific language.

MR. EISBERG: I can give you the page of Stolt-Nielsen. If you look at tab C which shows where the quotes from Stolt-Nielsen come from. And if you look at page 1769 of the Stolt-Nielsen decision, this is in footnote 7. And it's responding to what the dissent says. And what it says in

footnote 7 is, "The arbitrators need not have said they were relying on policy to make it so." And that was --

THE COURT: Where are you quoting?

MR. EISBERG: I'm sorry, your Honor. This is in footnote 7 which is on page 1769.

Your Honor, if I may continue?

THE COURT: That's the general logical proposition that just because they say it's so doesn't make it so. I agree with that.

But what does make it so is the question.

MR. EISBERG: What makes it so is -- and this is what I believe the Supreme Court was saying because it was rebutting what the dissent said -- what makes it so is that when you look at the analysis and compare it to the correct rule of law that if it strains credulity that the result that was reached is a result that would be reached by actually applying the rule of law, that's manifest disregard. If it lacks a colorable basis, then that is manifest disregard.

THE COURT: But the facts -- I know you wanted to go through the facts earlier, and I've read though those facts over lunch. They're not talking about the same issue. The issue here was -- the issue in Stolt-Nielsen, they basically said we're not applying the rule. We're applying what we think is a good policy that's reflected by the rule, and that there was some more direct statements by the district court -- I

think it was Judge Rakoff -- that Judge Rakoff, and by the Supreme Court, that says you can't go on policy, you have to apply the law.

There's nothing in those cases where they went through the analysis that they went through in this case where they said: This is the law. These are the factors that we must consider. We have considered those factors. We weighed these factors on one side. We weighed these factors on the other side. And we think the side in which we weighed the factors, the New York side of the factors, carries the day with regard to the contacts and the interest here. Nothing close to that in the case that you're relying upon.

MR. EISBERG: Respectfully, your Honor, I would say that it's exactly what happened.

THE COURT: Show me anywhere where the factual scenario of this case cited by Judge Rakoff or by the Supreme Court were anything like close to that they say happened.

MR. EISBERG: If you would turn to tab C the citations are listed out.

And what we see, your Honor, is that on the first page, in item number 2 of tab C, we can see that the panel -- and I'm quoting from the cases and the citations are there, "based its decision to allow class arbitration largely on the fact that in all twenty-one published clause construction awards issued under Rule 3 of the AAA the arbitrators permitted

class arbitration."

THE COURT: That has absolutely no analogy to what we're talking about here. They basically said look, they can't say we're going to do this just because 20 other cases did it. They have to do the analysis. Nobody in this case said -- the arbitrators didn't say we're going to do this because the last twelve times we did it, we did it this way. They went through the analysis.

How do you make this the same set of facts?

MR. EISBERG: Because the arbitrators in Stolt also considered maritime law and also considered Second Circuit law and also considered New York state law.

THE COURT: No. The reality is they did just the opposite. The Supreme Court said they did just the opposite. They didn't consider, right?

MR. EISBERG: Yes.

Your Honor, what they concluded is that they disregarded those laws.

THE COURT: Right.

MR. EISBERG: Even though, like here -- and this is the critical point.

THE COURT: Okay.

MR. EISBERG: This is the critical point. The Supreme Court characterized it that way like here. They characterized it as manifest disregard and as a failure to do the analysis.

THE COURT: What is it like here?

MR. EISBERG: It was like here because like here the panel expressly purported to do the analysis in the panel's award.

THE COURT: But in Stolt-Nielsen they didn't purport to do the analysis. They Court found they didn't do the analysis. They said look we're not going to do the individual analysis. They did it in all these other cases so we're going to do it. And the Court specifically said they didn't specifically cite nor apply the rules that should be applied in any of these -- maritime law or anything. They just came up a policy decision. That's not this case.

MR. EISBERG: You're exactly right, that the Supreme Court said that the reality is that they didn't do the analysis.

THE COURT: So in what way is the reality -- do I find that the reality must have been that they didn't do the analysis even though they said they did the analysis, they told me what factors they -- what law they applied, they -- which you don't disagree is the right law to apply -- they told me in what way they used the factors, they told me what factors they weighed on each side. How is that still the same?

I mean it may still be your argument and it may prevail, but it doesn't prevail because that's the same as what happened in the other case.

MR. EISBERG: Respectfully, your Honor, when you say: How is it the same as in Stolt-Nielsen?

In Stolt-Nielsen, the arbitrators did say we are applying international arbitration rules.

THE COURT: Right. And they didn't say how. And in this case they said how. They said this is how we're doing it. We're taking this rule. We're going to consider these factors. We're supposed to consider certain factors. We're going to weigh the factors. We're going to weigh the contacts in Abu Dhabi and we're going to weigh the contacts in New York. We weighed the two. We feel the contacts in New York are greater than the contacts in Abu Dhabi. So, therefore, New York law applied.

What else are they supposed to say?

MR. EISBERG: If you would let me explain what the arbitrator -- the panel did. Because I understand -- if you're going to conclude that it's not similar, I get that you might conclude that. But I just want to try to get out why I believe that it was similar because --

THE COURT: Are you talking about factually similar?

MR. EISBERG: I'm talking about the analysis the arbitrators purported to apply the analysis. If you would allow me to explain why I say that.

THE COURT: Sure.

MR. EISBERG: This is on tab C, item number 2.

And what happened is the panel in Stolt-Nielsen did say, did say, there was oral argument on it, and they had briefing on it, and the panel said: Listen, we've looked at the twenty-one other decisions on this. We understand that some of them -- we understand that some of them are in a different context. But even though factually some of them might be in a different context, we are persuaded that because they also involved international shipping that these other arbitrators came up with the right answer. And they went back and forth on that and weighed the facts. They listened to experts on this. And they weighed it. And they came up with a conclusion.

On maritime law, they didn't just issue a one-liner. They actually acknowledged -- and there's a paragraph on this in the Second Circuit and the district court decision, the panel, "expressly acknowledged the forcefulness with which," the arguments on maritime law were presented, including expert testimony. But they explained why they found the arguments about maritime law to be unpersuasive. And they said well we think these are unpersuasive in part because the arbitration decisions had been decided more recently under this AAA rule. So there was reasoning and explanation for why they did what they did.

The Second Circuit --

THE COURT: But the reasoning wasn't based on the

rule, the principles in a maritime law or the principles of New York law. They were based on the fact that other arbitrators did it this way so I'm going to do it this way.

MR. EISBERG: Your Honor, that was one thing that they found persuasive. But they didn't skip -- they were persuaded by their analysis of maritime law.

THE COURT: What was the analysis of maritime law that the Court said that they did in that case.

MR. EISBERG: They looked at what maritime law said. And the Second Circuit goes into this in detail. And they said, listen, we concede that there have been -- that previously under maritime law there has been this custom that generally does not allow class arbitrations. However, we can also see that after the passage, the enactment of a rule -- a AAA rule which was enacted specifically in response to a case called Bazzle v. Green Tree. They said we find more persuasive -- we're weighing the maritime law. We think it's consistent.

The panel expressly found that allowing arbitration law was "consistent with federal maritime law." That's 435 F.Supp. 2d at 385.

THE COURT: There is no such language like that. There is no similar language like that.

MR. EISBERG: What do you mean there is no similar language?

THE COURT: You're saying that that was what they identified as the weakness, infirmity of their analysis. That's not what these arbitrators said. They didn't say anything like that.

MR. EISBERG: The point is that these arbitrators, like in Stolt-Nielsen, purported to do an analysis of law and, as you're saying, to look at what the legal rules require, and purported to measure that up against the facts. That's what happened in Stolt-Nielsen.

THE COURT: Give me an example -- what's important for me is if you can give me an example of what you say in the context of this case would have been a sufficient record.

MR. EISBERG: Would have been a sufficient --

THE COURT: A sufficient record of the analysis. If this isn't a sufficient record, what else should have been said?

MR. EISBERG: Your Honor, what should have been said just as in Stolt-Nielsen --

THE COURT: No. Give me specifically in this context what they should have said that would have been a factually sufficient analysis, factually and legally sufficient analysis.

MR. EISBERG: If they had not colorably --

THE COURT: Don't tell me if they had not colorably. Tell me what it is they could have said that would have satisfied you that is missing here.

MR. EISBERG: They could have said this is the correct choice-of-law rule and it's New York's choice-of-law rule.

THE COURT: They said that part.

MR. EISBERG: Yes.

THE COURT: So that's not in front of me.

MR. EISBERG: And when they got to the facts that they focused on what they could have done and should have done is they should have viewed those facts in the way that they needed to be viewed under the law.

So, for example, under all of the case law when you have all of the meetings take place in New York, it strains credulity and it lacks any basis in any case ever decided by any court to say well there was a canceled meeting and so that is going to trump the rule that says it's the location of the plaintiff and where the harm is felt.

THE COURT: But they never said that. They didn't say that that trumps the rule.

MR. EISBERG: Sorry, the meetings in Abu Dhabi. All the meetings were in Abu Dhabi.

THE COURT: Right. And they recognized that. And they considered that. And you're not arguing that that in and of itself demands that their decision be reversed if you or I disagree with it.

MR. EISBERG: I'm arguing that --

THE COURT: That's not manifest disregard of the law.

That's not the definition of manifest --

MR. EISBERG: It is. Just like it was in Stolt-Nielsen. In Stolt-Nielsen if there is a lack of a colorable basis --

THE COURT: No. Stolt-Nielsen says "To vacate an arbitration award for manifest disregard of the law, the Court must find both that the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether. And the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." And it says that, "Given the broad latitude accorded the arbitration award, the doctrine of manifest disregard is to be invoked in exceptional circumstances only."

MR. EISBERG: Yes.

THE COURT: That's what the cases said.

MR. EISBERG: Yes. We agree with that.

THE COURT: So you have a heavier burden on that, to demonstrate that, not just simply say well we don't like the way they went through the process.

MR. EISBERG: Absolutely, your Honor. What you just said is a hundred percent true. And we acknowledge that it's a heavy burden and that it's more than just saying, listen, we disagree with it.

What we are saying is that when you look at how that analysis was applied in Stolt-Nielsen, Stolt-Nielsen was clear

that even if the arbitrators say, listen, I've looked at the law, I've applied the law, I've reached a conclusion, that's not enough to -- and the fact that they weighed factors is not enough to immunize it from manifest disregard review.

And that, just as in Stolt-Nielsen, when the court actually dug into what is the law here, what's the choice-of-law rule, and what did the arbitrators do here. And the court said there is no colorable basis for that. If you actually applied the law even close to correctly, this is what the result would have been.

And they did not take an approach which the Second Circuit did. The Second Circuit looked and said there's different sets of laws and there's some discretion here and so there just can't be manifest disregard.

And the Supreme Court said no. That's not the way to go about it, especially when it comes to choice of law -- they didn't use those words, especially when it comes to choice of law. But commentators have said this. The dissent have said this. The way that the Supreme Court went about looking at choice of law made it clear that they were looking to see in a searching way was there a colorable basis or not.

And, your Honor, I just want to point out that as the Supreme Court made clear at page 770. The Supreme Court said that when you look at the choice of law rules and if you're not sure what the result would have -- if you're unsure of what the

right result is, you throw it back to the arbitrators. If it's crystal clear what the right result is, you go ahead and you can do it -- you can do it yourself.

And the point is, because you were asking before: How would the result be different here? How would the result be different here?

Respectfully, your Honor, nobody can recreate how the result would have been different here. The point is that when there's manifest disregard, as the courts have said, parties are not deemed to have agreed that arbitrators can manifestly disregard the law, which is why it also means it's exceeded their powers under Section 10 of the FAA.

So where choice of law is wrong and when the whole ballgame -- again, it's like an umpire with the wrong rule book -- the question isn't, respectfully, your Honor, to prevail on a motion to vacate you have to show me how everything would have been different. Once you show that there has been manifest disregard of the law on choice of law, then there is no way to go back and recreate what would have been different if the whole ballgame had been different. The point is that's for the panel to do. And in order for us to have had a fair chance to present our case without the additional handicaps and impediments that never should have applied, this, like in Stolt-Nielsen, should be vacated so ADIA has a fair opportunity to present its case under the correct standard and

recover for the four-and-a-half billion dollars, which as we point out, when you talk about what case has a -- where is there the stronger interest, another thing that is overwhelming here and would have been overwhelming under any colorable application of the choice-of-law rules is that the money here that ADIA handles is money where the losses or gains belongs to the government of Abu Dhabi for the benefit of Abu Dhabi citizens. So when you talk about what is the most overwhelming imaginable type of interest in a commercial case, in a commercial case, this is a situation where it's billions of dollars lost by Abu Dhabi which is money for the benefit of the citizens of Abu Dhabi.

Again, there is just not colorable. There is no case that comes close to saying that when the plaintiff is in Abu Dhabi, the injury is in Abu Dhabi, the injury is to Abu Dhabi itself and its citizens, the fraudulent misrepresentations are sent into Abu Dhabi, the people who committed the fraud came to Abu Dhabi to finalize the deal and the amount of money on Abu Dhabi soil with the Abu Dhabi royal family.

THE COURT: But you're only reciting your half of the ledger.

MR. EISBERG: Your Honor --

THE COURT: You can't do that. Even you would concede that that would be an inappropriate analysis. You have to see: Well what are the other contacts on the other side?

So to say there is no case that would do it that way. Of course, if that was the only thing there was, then they wouldn't have to do a complicated analysis. They have to do a comparative analysis. And they will stand up and tick off all the other contacts that they say are in New York that have to be weighed in competition with that. And then somebody has to come up with a decision.

MR. EISBERG: Yes. And that decision, your Honor, that decision is a decision that can be not only wrong but lack a colorable basis.

Again, keep in mind, please, your Honor, that this decision of choice of law is not just one that the Supreme Court has made clear needs to be dug into in a meaningful way. But when it's done by a district court, it's not even reviewed for abuse of discretion. It's de novo review. So the fact that there are issues that are to be considered.

THE COURT: I'm not quite sure on what -- I mean you have to give me some more guidance.

When you say de novo review, my review is there a manifest --

MR. EISBERG: Oh, yes, yes.

THE COURT: -- disregard. That's not a de novo review.

MR. EISBERG: Then I was unclear.

THE COURT: When you say de novo review, that means

something different.

MR. EISBERG: It's different. Let me clarify, your Honor. I don't want though create that confusion. I apologize.

What I meant is in a situation where there is no arbitration at all, if a district court makes a decision about choice of law and it's then reviewed on appeal -- and the only reason I'm pointing it out that in that case it's de novo.

THE COURT: The problem you have, that rule does not apply to arbitration.

MR. EISBERG: That rule --

THE COURT: On the arbitration your burden is much higher to show a manifest disregard, not just that I, on a de novo review, disagree with the result that they came up with.

MR. EISBERG: Yes. The burden is manifest disregard. Absolutely.

What I'm pointing out is the fact that there are a number of items that are considered doesn't immunize it from manifest disregard review. It doesn't mean that because there are multiple factors it could lack a colorable basis. And of course one way we know that is because of Stolt-Nielsen where the Second Circuit said but hey there are lots of factors here and discretion was exercised. And since it's discretionary and since there are a number of factors, there can't be manifest

disregard. And the Supreme Court said no, that's just not right. And you can see that if you look at tab C, item number 3. That's exactly the reasoning and reversible error that the Second Circuit made.

It said, in item number E, you can see after -- 3E on the hand-up C. You can see the Second Circuit went through the different sets of law that the arbitration panel looked at. And it said for each one of them, none of them seemed to be clearly governing or do more than provide --

THE COURT: Yes. But none of these findings were made in this case. No similar findings of any of these lettered items were made in this case.

MR. EISBERG: No, no, your Honor. Sorry. I was unclear.

This was what the Second Circuit said. The Second Circuit said since the choice of law in Stolt-Nielsen necessarily involved weighing different considerations and there was some discretion, the Second Circuit said -- and you can see in item E -- the Second Circuit said since there is no law that establishes a rule of construction, the panel's decision, therefore, can't have been a manifest disregard of the law.

And the Supreme Court said no, no, no. The fact that there may not have been a preordained conclusion, the fact that there might have been some weighing, it can still --

THE COURT: It can still be.

MR. EISBERG: Yes.

THE COURT: That doesn't mean that it is in this case. I know what the general principles are. But I'm trying to get from you what it is -- you know, they seem to go in great detail what factors they weighed, in very specific detail.

Now your burden here is to convince me that despite the specific references and detail that they say served as the basis for their choice of law, that that was insufficient because they did X but they needed to do X plus one.

I'm having difficulty understanding what is the plus one that you say is missing out of here, other than you're saying well, you know, they should have done a more thorough job or they -- they say they win but anybody else who looked at this would say no, they lose.

Those are the kind of arguments that I hear you making rather than it's clear if you read this record and nobody could say on this record that they did any reasonable grounded analysis to come up with their right or wrong conclusion.

MR. EISBERG: Then I'll be explicit and say that. That's exactly the point. That the plus one, what they did wrong and why it is that nobody looking at this could say this is a colorable conclusion is that when you look at the facts that they focused on, and then you measure it against the controlling case law that says here is how that fact matters,

this is how that fact has an impact in choosing choice of law, on each of the facts that they looked at where there is a large body of case law that says this points to Abu Dhabi, this points to Abu Dhabi, and that points to Abu Dhabi, they looked at it and they said we see this fact, but in manifest disregard of the case law, we are going to give it the absolutely wrong, without any colorable basis significance. And that is manifest --

THE COURT: There's nothing in their decision that I should infer that from. They don't say that.

As a matter of fact, they say just the opposite of that. And they say in some instances that they give it significant weight, the kinds of things that you're arguing.

I mean they've said -- they've even acknowledged that some of the sections they looked at, that you have these particular points in your favor, to be weighed in your favor.

Don't they say that?

MR. EISBERG: They say that we are the plaintiff and that we're located in Abu Dhabi.

But then when they get to the fact that the in-person meetings were in Abu Dhabi, because there was one that was canceled with the excuse of weather, that the fraud originated in New York and it was directed to Abu Dhabi. The fact that the agreement was signed in Abu Dhabi, that the harm was felt in Abu Dhabi. When you look at --

THE COURT: They didn't say that those are insignificant or that they were ignoring those as facts.

MR. EISBERG: But you don't need to come out and say it. That's what Stolt-Nielsen --

THE COURT: What do you say they need to come out and say about those facts to be sufficient?

MR. EISBERG: To be sufficient --

THE COURT: Right.

MR. EISBERG: -- they need to, like in Stolt-Nielsen, go through a choice-of-law analysis after the correct law has been brought to their attention, purport to apply the law but do it in a way that lacks any colorable basis in law and/or strains credulity. That's the standard --

THE COURT: No. I'm asking you what do they have to say to be sufficient, a sufficient finding and analysis, not what they would have to do for it to be insufficient.

MR. EISBERG: For it to be sufficient what they would need to do is they would need to give the correct -- or at least they would have to avoid giving a palpably incorrect significance to the facts that they considered.

So, again, when you look at all the case law and you see the case -- a fact here that says that the misrepresentations were directed to and received in Abu Dhabi, the panel --

THE COURT: They're supposed to say what about that?

That we find that that is more important as a factor than the fact that they hired New York lawyers?

I've never heard anybody articulate that those are the details that they have to be able to be --

MR. EISBERG: Respectfully, your Honor, I think that when you look at the cases, both the cases cited by Citi and the cases cited by ADIA, what you find is that exactly the type of facts that are laid out here that the panel gave significance to are the types of facts that the cases have said weigh in favor of the law of -- in this case the law of New York law -- of New York applying. And the problem -- the law of Abu Dhabi applying. And that's exactly -- that's exactly the problem.

THE COURT: Well that's the conclusion. That doesn't tell me whether they got there the right way.

MR. EISBERG: Well, no. You're absolutely right, your Honor.

In order to assess whether they manifestly disregarded the law, it is necessary to look at what the previous cases have said about what is -- about what is sufficient. And our -- one of our hand-ups shows what the law has said.

The cases have been clear, that when you have a plaintiff that's located in a place and felt the harm in that place, it's very difficult and unusual to get around that rule. And you need to show that the overwhelming bulk of events is in

another state and that the state has a stronger interest in regulating the conduct.

And that's shown in tab D item number 2.

There simply is no colorable basis when you line up the cases that Citi itself cites. Because on tab D we cited Citi's cases only, not our cases, to show that even Citi's best cases show -- this is in item number 2 -- that when the cases have said fine, you're the plaintiff, the harm was felt there, but we're going to apply an exception to the rule. It's been in situations where the overwhelming bulk of events surrounding the fraud are in one place and also there's a stronger interest in --

THE COURT: But that's a dispute over whether or not you consider these things to be overwhelming or whether or not the arbitrator considers them to be overwhelming.

The arbitrator didn't disagree with that analysis. The arbitrator says I agree with you.

I'm trying to figure out which is the overwhelming bulk of events.

And you think the factors you ticked off mean that the overwhelming bulk of events is Abu Dhabi. But the arbitrator believed that the things that were ticked off on the other side mean that the overwhelming events were New York. That's not a manifest disregard of the law. That's just coming to that different conclusion.

MR. EISBERG: Your Honor, respectfully, in this instance it was not just wrong. It lacked a colorable basis, and that's the difference.

It is not the rule in New York, respectfully, that when you have an international arbitration and there's a choice of law, New York choice of law is applied. It's not the rule that there can never be manifest disregard as long as the arbitrators say I'm looking at New York's choice-of-law rule.

And if it were true that somebody like Citi could come in and say this guy is just disagreeing with the arbitrator's conclusion. New York choice-of-law rule says that you should look at which has a greater interest. And since you have to look at that, you're always just saying you really disagree about how the arbitrators gave weight to it.

THE COURT: I have to be able to articulate how much more you say that I would be convinced they must have done to satisfy that requirement.

This is not a situation where they did nothing in articulating the reason and applying the law that they say, and you both agree, that should be applied, the choice-of-law rule.

So it's not as if I have a record that's devoid of any analysis here. I have a record that has a very detailed analysis. And I have to say well despite that detailed analysis and the fact, the law that was clearly spelled out that they say they were supposed to use, an articulation of how

they used those laws, that because you say your factors are more powerful than their factors, that that makes it a disregard of the law if they think that the factors are more powerful in New York. That I have a problem with.

MR. EISBERG: Your Honor what I think matters here is -- so the question is when does something cross the line so it is no longer colorable.

THE COURT: That's exactly where I'm focusing.

MR. EISBERG: And there is a point where that happens. This is not exempt -- they don't even really believe, I think, Citi doesn't even really believe that it's exempt and that if it lacks a colorable basis it can be upheld.

And the way that you determine, respectfully your Honor can determine, where it crosses the line is what Stolt-Nielsen did, is you look at the case law and you say each of the factors that the panel looked at here, is it clear that this factor, clear-cut that this factor pointed to application of Abu Dhabi law. And that --

THE COURT: But there is no one single factor that clear-cut points to the application of Abu Dhabi law. There isn't.

MR. EISBERG: Well, there are.

THE COURT: No. It's an examination of all of the factors.

MR. EISBERG: And again the --

THE COURT: No one factor is determinative. There is no case law you can cite to me that says any one factor is determinative.

MR. EISBERG: Correct, your Honor.

The Second Circuit made the mistake in Stolt of saying since there is no one factor that preordains the conclusion, there can't be manifest disregard.

THE COURT: I'm not saying that.

MR. EISBERG: So this is a question where even though there are multiple factors you can look at, if when you look at how the case law has treated these factors, and the case law has made it clear-cut -- for example, if you're the plaintiff and you're located in Abu Dhabi and if the harm is felt there, their own cases say virtually always that's decisive. If you look at case law and it says it doesn't matter that the fraud originated in one place, what matters is where it's felt, but then you have a panel that gives the exact opposite legal significance to that, there is no colorable basis in the case law for that.

THE COURT: Well it's hard for me to see where they -- the panel gave the exact opposite legal significance to it. That's a characterization you're giving me, but I can't pick a line out of their decision that stands necessarily for that characterization that you're giving me. You want me to reach that conclusion but I'd have to do that in more --

MR. EISBERG: Your Honor, I don't want to start repeating myself. I'll just refer to tab E in the hand-ups where we lift out the facts that the panel focused on.

And in tab E, the ones that are highlighted, are the ones that the panel pointed to and said these -- the significance, the legal significance of these is that they point to New York law applying not Abu Dhabi.

THE COURT: You don't disagree that those factors would point to New York law?

MR. EISBERG: Absolutely. They do not, your Honor.

THE COURT: If those were the only factors and you didn't have the other factors on the other side you don't say -- which direction do you say that it would point that phonecalls are made from New York?

MR. EISBERG: The fact you said their -- that would --

THE COURT: That's not an Abu Dhabi issue.

MR. EISBERG: Your Honor, it is.

THE COURT: No phonecalls made from New York is a New York issue. Phonecalls made to Abu Dhabi. Abu Dhabi is an Abu Dhabi issue.

MR. EISBERG: Your Honor, their own cases are clear. Their own cases are clear that when you have a communication that begins in one place and goes into another state, that is a factor that points to the other state's law.

Their own cases. Because again on these hand-ups we

didn't cite our cases.

Their own cases say that the place where the fraudulent act originated -- I'm looking at the Cromer case which is in item 1 on tab D. It says the paramount concern is the locus of the fraud.

THE COURT: Right.

MR. EISBERG: That is the place where the injury was inflicted as opposed to the place where the fraudulent act originated.

So, when the panel says: Hey, I see that there were misrepresentations projected into Abu Dhabi from another place, I'm going to say the legal significance of that factor is that it points to New York.

But when your Honor looks at or looks at again the cases that both sides cited, the case law is clear-cut that that is a quintessential example of a factor that points to Abu Dhabi. So that's one example of where you really have --

THE COURT: Let me move you on so I can hear from the other side.

What do you want to say with regard to discovery? Because I can tell you my issue with how the discovery objection is framed is I'm not sure what it is that you say is the smoking gun that you have now that would have won your case that you lost the case because you weren't -- didn't have the opportunity to present that evidence at trial.

I understand you want to say well I wanted to fish for more. But that's not going to get you over the hump of saying that this should be separately set aside because you were denied two discovery requests out of six.

MR. EISBERG: Understood, your Honor.

The main point that I would like to make today about the discovery rulings is simply that they compounded the problem on choice of law, which is having raised the standards that ADIA needed to meet.

THE COURT: Well, compounding the problem doesn't make it a separate issue. Compounding the problem still makes it a choice of law issue.

I didn't think that that was the nature of your discovery issue. Your discovery issue, I thought, was that regardless of whether or not that I would find that it was improper, manifest disregard of the law with regard to choice of law, you independently did not get a fair hearing because they denied you access to important valuable, relevant, and persuasive evidence that you otherwise could have obtained and presented to the panel.

I don't think you go that far with that argument because I don't think that you have identified what is it that you know now that was out there that would have helped win your case that you didn't get an opportunity to have and present or explore during discovery.

When you talk about the e-mail, that's the main thing. I forget what his name is, the e-mail you talk about. But you were aware of the e-mail. You could have examined any officer or witness with regard to that e-mail. You don't say that -- you say you were denied some records underlying that. But you don't say your total discovery was cutoff or total examination was cutoff with regard to those areas of inquiry. And you don't articulate now what it is that additionally is out there that if you had it you would have won your case.

MR. EISBERG: Your Honor, you're right. We're not saying that there was a complete cutoff in the way that you've just described. So I don't want to overstate what we're saying about discovery.

In terms of what is out there, I believe you said that we know now that we didn't get, what is the smoking gun.

It is true that we have now learned that there's been a $450 million class action settlement which covered the timeframe that would have been applicable to us, involved similar issues. And so --

THE COURT: I'm not sure what that means. I assume that settlement didn't take place before your hearing. Maybe it did. I don't know.

MR. EISBERG: No, no. It did not.

THE COURT: Right.

So what is it that you say that that's evidence of

what was available to you that would have proved your case that you didn't get an opportunity to, one, present; or two, even discover?

MR. EISBERG: I think if you'd allow Mr. Calamari.

MR. CALAMARI: Thank you, your Honor.

It's really simple. Mr. Eisberg was saying it was a kind of a compounding of the problem of setting higher standards and then denying the discovery that would have been helpful or necessary to meet those standards. But putting it aside, the documents that were being sought were documents that would demonstrate -- one of the key misrepresentations that we cited was misrepresentation with regard to the capital needs of Citi at the time of the purchase. These were documents that would have disclosed what were those capital needs as disclosed to regulators at the time.

THE COURT: Why is that directly relevant as to whether there was a misrepresentation?

MR. CALAMARI: Because they would have shown what the capital needs truly were as opposed to what we were told was the capital needs.

THE COURT: Why did you not have an opportunity to explore that at the hearing or even with witnesses prior to the hearing itself?

MR. CALAMARI: Because without the documents we had no way to question the witnesses.

THE COURT: Well, that's never true. You could have asked the witness exactly what you just represented to me, whether they existed.

MR. CALAMARI: The witnesses we had, we did ask. But without documents, any answer they gave could not be challenged.

THE COURT: The question I got that the witnesses you had you never asked.

MR. CALAMARI: No. We asked many witnesses about capital needs and capital discussions. There was a major --

THE COURT: No. But the kind of information that you say you hope was reflected in these documents.

MR. CALAMARI: We know that the information would have been in these documents. We just don't know what the information would have disclosed.

THE COURT: So you don't know that it would have been information that would have advanced your case.

MR. CALAMARI: Correct. It could have been information that would have been devastating for our case. But, it is information we should have been entitled to view as part of the presentation of our case.

THE COURT: You were prejudiced how?

MR. CALAMARI: Again, we're prejudiced because we were denied access to documents that might have significantly contributed to our ability to establish points that the

arbitrators found against us, namely --

THE COURT: Well that's a possible prejudice but that's not an actual prejudice. You're not arguing that you can demonstrate --

MR. CALAMARI: To this day we don't have those documents.

THE COURT: -- that you had documents that you know now that if they had been given to you in discovery that it would have been relevant.

MR. CALAMARI: That's correct.

THE COURT: And/or persuasive on your claim.

MR. CALAMARI: That's correct, your Honor. We don't know today. We haven't seen those documents even as of today. So we don't know what was in the documents.

We do know that those documents would have established the --

THE COURT: Could have.

MR. CALAMARI: Could have established the capital needs at the time. And that was a key issue in the case.

THE COURT: But I don't know of a standard of review of an arbitration discovery, control of discovery that would give me a basis to say -- forget about everything else -- that I have authority to vacate the arbitration award because you got denied a discovery request that you even were, in fact, entitled to.

MR. CALAMARI: And I would agree with your Honor if you looked at it out of context as a single issue, but it reflects a tainting of the entire proceeding.

THE COURT: I understand that.

MR. CALAMARI: As part of several rulings that when you put them all together they set standards for us to prove that were inappropriate.

THE COURT: When you say as a single issue, I'm not looking at or even inquiring about whether or not it's a single issue. I'm trying to figure out whether you say this is an independent ground for vacating the award.

I don't hear you saying that you're arguing that if you can't prove the other, that this somehow is an independent ground on which I alone could vacate this award and just send it back to them to give you the discovery and start all over.

MR. CALAMARI: I would not argue that vigorously. I think that is -- it is technically, I think --

THE COURT: Sometimes if you argue it vigorously it makes it easier for me to decide against you.

MR. CALAMARI: Technically you would have the power to do that.

THE COURT: I'm not sure I would have the power to do that. I'm not sure that I do have the power to do that. That's not a ground for vacating an arbitration award because you got denied a discovery request --

MR. CALAMARI: Correct.

THE COURT: -- that you should have gotten.

Quite frankly, that wouldn't even be a ground for the Second Circuit to reverse my decision simply because I told you you couldn't have a piece of paper. And then you said I can show you that I really was entitled to it and so therefore I'm going to reverse the whole case and they're going to send it back.

MR. CALAMARI: I certainly agree with that.

If, however, it tainted fundamental unfairness of the proceeding or reflected the fundamental unfairness of the proceeding.

THE COURT: Well, reflected it doesn't matter.

MR. CALAMARI: It would be a basis because you could find that the proceeding was just unfair and --

THE COURT: But why would I find that the proceeding was unfair because you didn't get your document you wanted?

MR. CALAMARI: As I said, your Honor, if you look at it as purely an independent ground, I can't disagree with you. I can only say that it's part of the entire problem that we're dealing with today.

THE COURT: Unless you have anything else let me hear from the other side and then I'll let you reply. Let me beat up on them.

MR. FAGEN: Thank you, your Honor.

Les Fagen for Citi.

Even lawyers sometimes make Freudian slips. My friend, my adversary when he was answering the question said the word de novo, de novo review. And I would respectfully submit that that's what ADIA is looking for. And they're using I'd say four hundred references to the Stolt-Nielsen case to get there.

Your Honor, the manifest disregard standard still lives. It is still the rule of the land. And it says that to vacate you have to find that that panel defied a controlling principle of law that clearly dictated the outcome. That standard emerges from a section of the Federal Arbitration Act that talks about corruption and impropriety on the part of the arbitrators. It is a brutal standard. It's an accusation of arbitrator personal misconduct. Your Honor, in your recent decision, I think a year ago in Finkelstein, you called it the doctrine of last resort.

So now let's look against that standard what's going on here.

THE COURT: Well it doesn't have to be misconduct.

MR. FAGEN: It has to be a manifest disregard of the law. They knew the law and they knowingly disregarded it even though it clearly compelled the opposite result. That is a tough standard for anybody to reach.

So what do we have here? Your Honor knows the record

better than I do. They went through everything. They evaluated everything. They didn't disregard anything.

Let me just make some clarifying remarks here, if I may, with all respect to my adversaries.

First point. They have not identified the standard of law that was, in fact, allegedly defied by the panel. The parties agreed, and ADIA conceded before the panel, that the choice-of-law rules here was dictated by the ICDR. That was the governing body for this arbitral process. And that's what the panel applied.

THE COURT: That was only the first step. Because that rule takes them to New York law. And New York law takes them to the New York choice-of-law examination.

MR. FAGEN: Not entirely, your Honor. You're right. But the first thing the panel said is: We have the right to look at international arbitration norms. Before they even got to New York law they said that. And they did.

They said under international arbitration norms, the seat of the arbitration often dictates the choices.

THE COURT: Right.

MR. FAGEN: They also said we have the right to consider the wisdom of one single law regime.

Well, the parties have three contracts. Each of those contracts say New York law, New York law, New York law. We don't want to mix and match. We have the right to do that.

That was a whole separate analysis. You didn't hear a word from ADIA challenging that basis for the decision.

And then you're quite right, your Honor. In addition to that, they evaluated New York choice-of-law issues. Your Honor has asked questions about that. They went through the entire process.

So when you talk about manifest disregard, where was the disregard? I'll tell you where they think it is. They simply say it has to be Abu Dhabi law. It just has to be. And under New York choice-of-law analysis, it just has to be one interest. That's the only thing that matters, where the place of injury is.

Your Honor, they say that we cited cases that say what they say. Not so. In fact, there are numerous cases which say place of injury does not trump everything if the overwhelming interest analysis says New York.

We cited to your Honor a Judge Scheindlin case called Cromer that said exactly that. The panel relied upon it. They said, sorry, the place of injury isn't as important when this jurisdiction, New York, has the interest of governing the conduct of financial institutions in New York related transactions when the financial institutions are here.

So, it is not true, it is just not true that the law says: It's got to be place of injury. The default is not place of injury. The default is the balancing of interests.

And often the courts say no. It isn't the place of injury. It's the place of the tort. And that's what the panel said here. Overwhelmingly they said here it was New York.

We've cited Cromer. We've cited Amusements. We've cited Chase Manhattan Bank. We've cited a Judge Lynch case, which I'll get to in a minute. All of them say the same thing. We're not going with the place of injury alone. New York interests other than that can trump.

Let me just go to Stolt-Nielsen because I've heard it so often today. And effectively what my adversary is saying is that obliterates the manifest disregard standard as we have known it for so many years. Not so.

What was Stolt-Nielsen? Your Honor looked at it during lunch. I don't have to tell you all that much. It really was not a choice-of-law case. The Supreme Court in its own analysis of that case not once mentions the words "choice of law."

That was a case where an arbitration panel chose to take on a class action. Your Honor will know how controversial that is.

Well, the Court said you did that without citation to the FAA, maritime law, or New York law; instead, relying on arbitral rulings which are not precedential, you decided to develop public policy. No way. And so they vacated.

And the interesting thing, your Honor, is they didn't

vacate it under the FAA, Federal Arbitration Act section that these people are moving under. They adjudicated the decision under 10(a)(4) of the FAA which is a provision not about arbitrator impropriety as these people are saying. It's about the authority of the panel. Did the panel have authority?

And what the Court said is: In your case, Stolt-Nielsen, the parties didn't articulate a standard to determine whether you could take class actions. So you had to look at the law. And you didn't. You acted in a vacuum, a public policy vacuum.

That's not our case. Here the parties did articulate a standard. It was the ICDR standard. And our panel didn't act in a vacuum looking at nonprecedential decisions. The panel used law, cases, norms, analysis.

So Stolt-Nielsen is absolutely distinguishable. It has nothing to do with our case.

Last point, your Honor. On choice of law the panel relied not only on the cases in the -- the rulings you just described. It relied on their conduct, on ADIA's conduct. And that was important. Because ADIA is in this court saying it's got to be Abu Dhabi law and it's got to be a New York choice-of-law analysis which only emphasis one factor, place of injury.

Well that's not what they said before the panel. That's not what they did. In their statement of pleading they

asserted fraud and negligent misrepresentation explicitly as a matter of U.S. securities law and explicitly alleged all the elements required under New York law for fraud and negligent misrepresentation. It's easy to see because Abu Dhabi is a civil law country.

Here they allege reliance. Remember they said to you under Abu Dhabi law we don't need reliance. They alleged it.

Not only that. In post pleading motion practice directed to those claims and in vague trying to justify discovery what did they rely on? Principles of Abu Dhabi law? They asserted New York case law to justify their cause of action and justify their discovery demands. That went on for a year of this arbitration until they woke up and said well maybe tactically Abu Dhabi would be better.

And then what did they say? In attempting to introduce an Abu Dhabi law expert, did they say it has to be Abu Dhabi? No. They said -- and I'm quoting, "arguably it might be Abu Dhabi law." And these are the people who are saying today that it is a manifest disregard of law to do anything other than Abu Dhabi law.

Now, your Honor, it's hard to accuse the three distinguished senior lawyers who wrote an 84-page, single-spaced decision of manifest disregard, impropriety, when they themselves did a pretty good job of disregarding Abu Dhabi law themselves. And when they say our cases, our cases, our

cases all call for, you know it's got to be in a New York choice of law analysis, the place of injury. In their briefs to the panel on this issue they said there are, "numerous cases which do not go with the place of injury," citing the very cases that I told you about before.

So the panel below I think would be quite surprised, quite surprised indeed to hear these people say manifest regard because it had to be Abu Dhabi law, it has to be a New York choice of -- analysis which only emphasizes the place of injury.

Now, your Honor asked a couple of questions earlier whether there would have been a different outcome under Abu Dhabi law if indeed that had been applied. Well, your Honor, just taking what they quoted from their expert, that it had to be knowing and unreasonable misconduct with respect to the misrepresentations.

THE COURT: Wrongful.

MR. FAGEN: Well the panel addressed those issues effectively. Why? They were testing a fraud claim and they were testing a negligent misrepresentation claim.

If your Honor wishes to look at their rulings in that 84-page, single-spaced decision, no knowing falsity, no knowing falsity, that was addressed. There were findings on page 18 with respect to subprime. There were findings on page 23 with respect to systems consolidation. There were findings on page

25 with respect to capital expectation. They made similar findings on no recklessness. Page 19 through 21 on subprime. Page 24 through 25 on SIV consolidation. And lastly, no unreasonable behavior. They made findings on that too. That's page 47 of the 84-page decision.

So if their expert is right about what Abu Dhabi law requires -- and I'm not saying it is, that's what they're saying -- knowingness, reasonableness, there were findings aplenty on each and every one of those issues in this arbitral decision. And that was based not on allegations made in a courtroom -- which I would respectfully suggest are selective and misleading -- but on hearing the witnesses, seeing hundreds of documents, really judging the credibility of the witnesses. That panel in a month-long trial made factual findings on each of the elements they say drives Abu Dhabi law.

THE COURT: You quoted page 47?

MR. FAGEN: Yes, sir. That was on no unreasonable behavior.

THE COURT: Under what section?

MR. FAGEN: Let me get that for you, Judge.

It's under the section entitled negligence, your Honor, which is of course the reasonable care claim of action.

Looks like the last sentence, your Honor. I'm afraid to read it into the record.

THE COURT: That's okay.

MR. FAGEN: Let me spend just a minute, your Honor, on the document requests.

THE COURT: Yes.

MR. FAGEN: Your Honor made reference to it. The standard here is they would have to show that the denial of those two requests would render the entire two-year arbitration fundamentally unfair as a matter of due process. No court -- and God knows ADIA looked for those cases as we did -- no court has ever vacated an arbitral ruling based on the denial of two discovery requests.

Let me say, your Honor, there were 60, approximately 60 demands. We got killed trying to object to them. The panel ordered production of about 550,000 pages of documents on all of these issues of subprime, SIVs, capital needs. Every conceivable kind of document was spread out on the record, most of them related to those issues.

The notion that the denial of two discovery requests when the panel gave them all of that discovery, extraordinary discovery for an international arbitration, where they had pretrial witness statements with affidavits and exhibits, unlimited cross-examination of all of the witnesses they wanted. Twelve Citi current and former executives took the stand, were cross-examined. That's not due process? I don't think so.

I'll just say one last word on the famous Bowen e-mail

request. That was a poorly drafted, ambiguous document request and totally cumulative of the other 60. They're now saying: Oh, this would have been so important for subprime and capital needs and we wanted to see it.

They had every document they asked for. That request, not only poorly drafted, was utterly cumulative. And the e-mail was drafted by a guy, a former employee who was not in any of the groups or divisions or departments that dealt with subprime valuations, that dealt with capital needs. He was in retail mortgaging.

So it was not surprising that the panel said we don't even understand what this request means. It's written by somebody who doesn't even know much and it's poorly drafted and cumulative.

THE COURT: It's difficult for me to accept the argument that it was merely cumulative and that they already had it if you resisted giving it to them.

MR. FAGEN: Well, no, your Honor.

THE COURT: If that would have been your response that you already have it, and it's already cumulative. The response was no, don't give it to them.

MR. FAGEN: No, your Honor. It's different. They had the document.

THE COURT: But that wasn't your response. Your response was opposition to the request.

MR. FAGEN: I'll tell you why.

THE COURT: That's different.

MR. FAGEN: Just to defend my honor.

THE COURT: You already have it. Don't bother me.

MR. FAGEN: No, no. The request called for this. Not the e-mail. They already had the e-mail.

THE COURT: I'm not talking about the e-mail.

MR. FAGEN: What they asked in their question is: Well, Mr. Bowen seems to think there are unrecognized financial losses.

THE COURT: Right.

MR. FAGEN: Well could you give us every document about unrecognized financial losses.

THE COURT: Well that's a different argument. That's an argument it might have been too broad. That's a different argument. That's not an argument that they already have it and therefore it's cumulative. If they already have it and it's cumulative the issue would have been moot.

MR. FAGEN: You asked why we resisted. It was a crazy document request.

THE COURT: You didn't resist because it was cumulative and they already had it. You didn't resist on that basis.

MR. FAGEN: On cumulative, we said they have all that they need on these subjects.

THE COURT: The other side always thinks they have all that they need.

MR. FAGEN: Well I'm always on the other side.

I guess the only point on that e-mail, Judge, is it was so apparent what was going on here during the trial. They had the right to call Mr. Bowen to the stand. They dropped it. Bowen sent his e-mail to three Citi employees. They dropped two of them. The one Citi employee who got the e-mail, who took the stand, they never asked him a single question about Bowen or his e-mail.

THE COURT: Were these witnesses ever examined prior to the hearing?

MR. FAGEN: No depositions. Just those witness statements I referred to.

My point is it wasn't important. Today it's the epic of vivid evidence that might have made a difference.

There's just no way that comes close to saying that that's fundamentally unfair, a violation of due process.

This panel, Judge, worked very hard. One of the panelists was their nominee. All the decisions we're talking about were unanimous, including their nominee.

They wrote those decisions. They listened to every argument. Everything you heard today that panel heard at length. Briefing, argument, analysis. They did everything. They spent zillions of hours on this matter.

To accuse them of some form of impropriety, depriving people of due process, manifestly disregarding law is just not right.

Thank you, your Honor.

THE COURT: If you want to respond, go ahead.

MR. EISBERG: I'll respond very briefly, your Honor.

THE COURT: Sure.

MR. EISBERG: Let me just go through a few of the points that we just heard. One point that we heard is that under the ICDR choice-of-law rules the panel here was allowed to and did do things like say we don't want to mix and match law and we'll look at international arbitration law.

I would just point out that's exactly the mistake that the arbitrators made in Stolt where the Supreme Court said you went off and you looked at international law, twenty-one prior arbitration decisions. That's manifest disregard.

Also, when I hear Mr. Fagen say that Stolt was not a choice-of-law case, it was all about choice of law. Your Honor has read it. The Second Circuit opinion had pages and pages. There was a section called choice of law.

And if you look at tab C, you can see that the Supreme Court decision was driven by choice of law. Tab C, page 2 says, "The arbitrators' proper task was to identify the rule of law that governs." That's a quote. And that's at page 1768.

And they said that the manifest disregard was that

instead the panel, "proceeded as if it had the authority of the common law court to develop what it viewed as the best rule to be applied."

Moving on to another point. The case law, when Mr. Fagen says that they cite lots of case law and that the case law suggests a different rule than the one that I've been saying is the rule that applies, and we mentioned Cromer and Chase Manhattan and Amusement, I just want to point out so that when your Honor goes back and spends some more time with this, those are the very cases that we list out and quote in our tab D. And you will see their cases, the ones that go their way, the best ones that they could find, recognize that to ignore what I had called the default rule, the place of the plaintiff and the location of the harm, it's their cases that say you need to show the overwhelming bulk of events and the other state has the stronger interest. That's their cases and they're listed out. So I was talking about his cases earlier.

Another point that they brought up is they said how could this possibly be manifest disregard if there were lots of witnesses and lots of exhibits and a distinguished panel, lots of hearing days. The same was true in Stolt-Nielsen. There was lots and lots of stuff in the record. Kenneth Feinberg, a very distinguished arbitrator. Judge Rakoff said it was a very distinguished panel. The point is with choice of law that it doesn't matter how many documents you get to put in or how many

witnesses you get to call when the whole thing is measured by the wrong standard.

They also made a argument -- and I've just got a couple more here and then I'll sit down -- they also made the argument that supposedly we delayed somehow in bringing up the choice of law. To begin with, ADIA did raise it in a timely fashion. The ICDR rules don't set any deadline for it. And ADIA promptly brought its motion to apply Abu Dhabi law by the deadline set by the panel, which was about five months before the hearing. I would just point out that this is yet another example of where the panel manifestly disregarded the law. The choice-of-law rules simply are not sensitive to the type of delay that's being brought up.

In Stolt-Nielsen, in fact, the parties had agreed, agreed that a certain principle of law controlled. And Judge Rakoff said that makes absolutely no difference. He said at page 384 of his -- of Judge Rakoff's decision, he wrote, "Even if as the panel suggests, the parties agreed that Bazzle..." meaning a certain court decision that your Honor is familiar with "...governs the issue, that underlying assertion is plainly wrong and no agreement can make it right." And Judge Rakoff vacated the award and he ended up being affirmed.

So in Stolt the arbitration panel ignored the factors that actually do matter under the choice-of-law rules like the location of the plaintiff, the place of the injury; instead,

looked at other factors like what Mr. Fagen was saying, international law, like did the parties initially think or suggest a different set of law applies. And the Supreme Court said no. You can't look at these irrelevant things, panel. They are choice-of-law rules and they're important. And they're going to be reviewed for manifest disregard.

So this is an example, once again, of the panel giving weight to its own preferences and judgments. They are choice-of-law rules. And they don't say well if you had raised it five months before the hearing that somehow weighs in favor of one choice of law or another. They made up that up. That's their policy. They looked at other international arbitration decisions just like in Stolt where the Supreme Court said you shouldn't have been looking at lot that. You look at the clear-cut rules.

By the way -- I don't want to belabor this -- when ADIA did raise this point about choice of law, it was raised very, very clearly. They point to some early briefs in the proceeding.

When it came time to say this is the law that should be applicable to the hearing here, ADIA made definitive statements. For example, ADIA said that New York choice of rules "must apply" and "should apply" and I'm quoting, said "Citi is simply incorrect in asserting that choice-of-law analysis by an ICDR tribunal sitting in New York diverges from

choice-of-law analysis that would be undertaken by a court sitting in New York."

You can see that at pages one through three and seven through nine of ADIA's opening brief to the panel, which is Exhibit 10 to the Spray declaration under page two of ADIA's reply brief which is Exhibit 4 to the Waldo declaration.

Finally, your Honor, I just want to mention the point on whether or not the outcome would have been different here. We believe that it is clear that the outcome would have been different here; that evidence that we provided to the panel, easily under Abu Dhabi law, would have passed the threshold. For example, there was evidence that -- from Mr. Bulgary, who provided answers to -- responses to questions and answers that he had a document showing that subprime losses were actually estimated to be higher than what was told to us. And under Abu Dhabi --

MR. CALAMARI: Either approach.

MR. EISBERG: I'll stop there.

But there was other evidence in the record that under Abu Dhabi law would have been -- would have been enough.

But what I want to point out is the more important point, is that when it comes to choice of law -- and again I believe that Stolt-Nielsen is clear on this, as well as Second Circuit case law -- when you get choice of law wrong the question can't be -- respectfully, a judge can't after the fact

go back and redo the entire arbitration. That's not the task and not, respectfully, the proper procedure to say what would this baseball game have looked like if the correct rulebook had been applied.

The problem is that the panel's award -- the panel wasn't looking for, and in their view didn't need to look for and recite the facts that would have mattered under the correct legal standard. So, the entire proceeding was thoroughly corrupted by this error. And the proper result, at a minimum, we submit, is to vacate it, just like Stolt-Nielsen said it was manifest disregard. So we have the opportunity to have balls called as balls and strikes called as strikes.

THE COURT: Let me just ask one question. You raised an issue.

At what point as this issue actually raised?

MR. EISBERG: This was raised five months -- I believe it was five months before the hearing.

Let me explain to you, if I could, the way that it came up.

THE COURT: Okay. But before you explain that, I'm just trying to get a feel for it.

Was this after discovery had closed?

MR. EISBERG: Your Honor, I was not --

MR. FAGEN: I can help, your Honor.

THE COURT: Yes, sir.

MR. FAGEN: Discovery closed on October 29. There was a first indication about Abu Dhabi law in November. And there was a motion for summary judgment to get Abu Dhabi law selected as the choice of law in December. So it was well after discovery. It was a year into the arbitration which had been initiated before.

THE COURT: The reason I asked, and I want to analyze it in this context, which may or may not be significant. If that's the case, then I should assume that your record was closed with regard to all of these issues prior to your raising the choice of law question. So, therefore, unless the record here supports your claim that you could have prevailed on that choice of law, you can't make the argument that there was something else out there that you could have found out and pursued that would -- that was not already available to you and that you can't articulate now that would have been the basis on which you would have won on these claims.

MR. EISBERG: Two things on that, your Honor. My understanding -- I was not involved in this at the time so Peter may correct me -- but my understanding is that although there was a discovery deadline, that there was discovery, in fact, being produced right up to the hearing and that Citi produced documents even after the hearing had started. And I see nodding yes.

And second, but more important, more important, let's

just assume discovery had closed, not a shred of paper was produced after that. The prejudice here, respectfully, your Honor, is different than what your Honor just articulated which is, well, you can't come in here and say you would have had more ammunition, you would have had more bullets you could have been shooting in the battle. You would have had whatever you had because discovery was over.

It's different. It's that when the wrong law applies, you pick up the bullets and you aim at the target. And the target shifts when the law is different. And the panel is looking for you to hit different targets. And the decision is going to be written about a completely different event than what would have happened.

So if you have -- I'm stretching the analogy but if you have ten facts that are dynamite, they're explosive under Abu Dhabi law, but the panel has said no and I'm not even going to let you have an expert come in here and talk about how Abu Dhabi law applies to these facts and you have a certain amount of time to present your case, it doesn't matter that you had those bullets sitting there. You're in a different war. They dropped you into a different country with different rules. So that's the prejudice. And that's why again --

THE COURT: I understand that. But you neither articulated that evidence to the panel nor articulated that evidence to this court that you say well look at the winning

case that we have that we discovered in discovery with regard to the Abu Dhabi claims. That's not the posture that you're in.

MR. EISBERG: Well, your Honor, again, respectfully, I don't believe that on a manifest disregard review on choice of law that it's the burden of the court or even possibly the burden of the movant to say not only was there manifest disregard of choice of law, which means the arbitrators exceeded their power, that's enough for vacatur right there. The idea that you then have to try to do sort of a trial within a trial and say let me recreate what it would have looked like if the rule book, the correct rule book had been applied. That's not the standard.

Now, again, I do believe that there's evidence -- and there was evidence in the record that we can point to that makes it clear that under Abu Dhabi law it would have been different. Like one thing I mentioned before, which I won't again because the Court is open. I would also say if you turn to page 70 of the award, which is Exhibit 8 to the Spray affidavit -- sorry, page 19. Page 19 of the award you can see that there is a list of evidentiary bases -- this is the first bullet point, your Honor.

THE COURT: Right.

MR. EISBERG: There's a list of evidentiary bases that we cited. And in the footnotes it goes -- it identifies, in

some cases more specifically, the evidence that we gave.

And had that been measured against a different yard stick, the game would have looked very different.

And, your Honor, that is the fundamental unfairness. That when you get the wrong rulebook applied, all of this stuff is measured against the wrong standard. So all you need to do in manifest disregard for choice of law is show what the Second Circuit has said: That there was a law, and it was clear and controlling, it was brought to the arbitrators' attention, and they got it wrong and without any colorable basis.

THE COURT: But the prejudice to the outcome that you're arguing is -- would solely be under those circumstances the fact that you didn't get an opportunity to present the evidence at a hearing, not that you didn't have the opportunity to obtain the evidence during discovery.

MR. EISBERG: The prejudice is it getting measured against the wrong standard.

THE COURT: No. I understand that.

But I'm saying the -- when I'm talking about prejudice I mean to say -- in a more basic not determinative analysis, but a more basic analysis that the question also is: Is the law different in two different jurisdictions?

MR. EISBERG: Yes.

THE COURT: And would the result have been different had you applied the different law?

I think that is a relevant consideration. It's not a determinative factor. Because, obviously, if you were standing here and saying Abu Dhabi law is the exact same as New York law there would be no dispute here. You're saying it's different. And it's different in a way that you have enough evidence accumulated to win and meet that burden under Abu Dhabi law. And you were denied the opportunity not to discover it but denied the opportunity to present whatever you had accumulated in support of that claim.

MR. EISBERG: Yes.

THE COURT: Because discovery was done.

MR. EISBERG: I believe the cutoff had come. There was some discovery after that.

THE COURT: Yes, but the discovery -- the outstanding requests that you thought were relevant to even -- I can't fault the panel for saying that you weren't ready to move forward on an Abu Dhabi claim because you made all of the requests in a timely manner, and even if it was still trickling in, that you thought were appropriate for you to do during discovery in order to support your anticipated claim.

MR. EISBERG: That's not --

THE COURT: And your request was not: Oh, Judge, at the last minute, you know what, we think it ought to be Abu Dhabi law and, you know what, we just figured that out, so why don't you give us some more discovery so that we could

demonstrate that we can meet our burden.

What you had is what your record was or what -- at least, as you say, the ammunition was that you had to support that claim.

MR. EISBERG: Yes, your Honor.

THE COURT: So you're not arguing that you were prejudiced early on during the progress of prehearing proceedings. You say you were prejudiced solely and in the manner that by the time you got to the hearing and made that request, that that request to apply that law to the facts as you knew them was denied.

MR. EISBERG: Yes, your Honor.

THE COURT: I think that's an accurate way to put it.

MR. EISBERG: I would just point out, your Honor, on one of the points that you raised earlier about whether or not it makes a difference. The panel itself found and the reason that choice of law was necessary.

THE COURT: Give me the page.

MR. EISBERG: Tab 12 of the Spray declaration.

THE COURT: Page 12?

MR. EISBERG: I'm sorry. Tab 12 of the Spray declaration. This is the panel's decision on governing law. And it's on page three.

THE COURT: Page three -- I already have some highlighted stuff. I did look at this earlier. The two bottom

bullet points.

MR. EISBERG: I just want to point out in the second-to-last filled-in bullet point, the panel found that there is sufficient apparent conflict between New York and Abu Dhabi.

THE COURT: Yes.

MR. EISBERG: So the panel wasn't saying we think the outcome is going to be the same no matter what we do here. They were saying we think there's a conflict here. We have to decide which one, in order to get the balls balls and the strikes strikes.

THE COURT: But that cuts both ways because it is also a clear indication that they recognized that they had to do the New York interest analysis. And they clearly indicated that they went forward and did it.

MR. EISBERG: Your Honor, that respectfully cuts in favor of vacating for manifest disregard because a requirement, a requirement, an element to get vacatur for manifest disregard is that you brought the law to the panels attention and they were aware of it. If they hadn't said this, then Citi might have available to them: The panel didn't even know about this.

THE COURT: That advances your point one. But that in and of itself doesn't advance your point two that they disregarded it. As you say, you're right that it's not simply sufficient to say they did it. But we know that they -- it

isn't insignificant that they laid out for the parties that this is the analysis they went through. And the question is whether or not the rest of the record supports that such an analysis was done correctly or incorrectly.

MR. EISBERG: Yes, your Honor. The fact that they were -- that the correct law was brought to their attention and that they were aware of it is not sufficient. But it is necessary for manifest disregard. And so that part of the decision shows that we satisfy the necessary elements. It does not, however, show that it should not be vacated.

If you would look at -- if I could point your attention to other parts of the same document that you're looking at.

THE COURT: Sure.

MR. EISBERG: For example, if you look at page three of the statement of reasons that we're now looking at, your Honor.

THE COURT: Yes.

MR. EISBERG: The bullet point second from the top.

THE COURT: Which line? The first line?

MR. EISBERG: Yes. "Thus, for example."

THE COURT: Yes. Let me just read it.

(Pause)

You don't disagree that that would be an appropriate approach. You're just saying they said they did it but they

never did it.

MR. EISBERG: Actually, your Honor, I'm saying that's an inappropriate approach. Just like looking at the twenty-one published arbitration decisions in Stolt-Nielsen. The Supreme Court said dead wrong.

THE COURT: No. The Supreme Court did not say you can't look at that. The Supreme Court said that those weren't determinative. That's not the way to decide it.

Now, arbitrators go back and look at prior arbitration decisions and the rationale and the cases that are cited in those prior arbitration decisions to give them some guidance as to what they do. Just as if I would look at Judge Rakoff's decision to give me some guidance. But it's not a determinative factor, because he did it down the hall that I'm supposed to do it down the hall the other way.

But I don't take anything the Supreme Court says that the arbitrators are supposed to ignore what they or other arbitrators have done and why they have done it and the analysis that they've used and the rules and the laws that they applied. They're saying that you can't -- if that's solely what you do, and that's the reason why you are ruling that way, you can't make up law by saying that you are just creating precedent for yourself. You have to have a genuine legal basis and rationale for it.

So I mean I can't accept the proposition that says

that you have to put a blinder on when somebody says well why don't you read this case that we just decided last week.

MR. EISBERG: I agree with your Honor that what Stolt-Nielsen -- that Stolt-Nielsen does not say -- does not say that you have to put blinders on and ignore what others have said.

THE COURT: But it says it cannot be -- that can't be the basis for your analysis.

MR. EISBERG: But the Supreme Court did fault the panel.

THE COURT: Yes.

MR. EISBERG: For.

THE COURT: For relying solely on that.

MR. EISBERG: For following the -- what it saw as the rule in those decisions.

THE COURT: Right. That that's what motivated them rather than doing, instead, or in addition to, the appropriate analysis that they did.

MR. EISBERG: Yes.

For example, in the same bullet point where they point to the practical utility of applying one law. There's nothing in choice-of-law rules that says, again, doing something because it's convenient, right, the treatise is, the cases, you don't apply the law because it's convenient. Practical utility. That's a preference. That's just -- that is not a

colorable basis. That's manifest disregard of the law. And, again --

THE COURT: Well if that was the only bullet point, that would be true.

MR. EISBERG: Well, your Honor, when you --

THE COURT: Because they say that that is helpful to them and then they still additionally, if they still additionally do a sufficient analysis --

MR. EISBERG: Your Honor, respectfully, when you have an arbitration decision, which we say clearly and manifestly is disregarding the New York choice-of-law rules which would give no weight to any of this, and a thumb is put on the scale, even it's explicitly a thumb is put on the scale and the arbitrator is saying hey there's another reason that I'm going to do this and it's practical utility. And as a reviewing court to then tease out and say well I'm going to assume that even though that manifestly disregards the law, it's still okay.

I think that the precedence for manifest disregard goes in exactly the opposite direction. And that's why in Stolt-Nielsen the Supreme Court specifically culled out and said I see that instead of looking at only the law that matters you gave weight to about four other things, you gave weight to the parties seem to have agreed a different rule applied, and you also gave some weight to your interpretation of New York law in the Evans case which, by the way, you got wrong, you

also gave weight to your interpretation of maritime law. And the Supreme Court said that by looking at all those things, that actually counted as imposing your own preferences and policy judgments. Because as the Supreme Court said, the task of the arbitrators, I'm quoting, "The arbitrators' proper task was to identify the rule of law that governs. The task of an arbitrator is not to make public policy."

"What the arbitration panel did was simply to impose its own view of sound policy."

"The panel proceeded as if it had the authority of a common law court to develop what it viewed as the best rule of law to be applied."

And Stolt-Nielsen did that, looking at a panel that reached out to things just like the practical utility of applying one law and reached out to international arbitration law, like twenty-one -- in the Stolt case, twenty-one prior arbitration awards.

It's the same exact error here.

THE COURT: Well, I can't -- I think I have to read that whole paragraph and its contents. In isolation you can't just pick a portion of that paragraph or that sentence because that bullet point also recognizes that at the same time they have to balance the need to respect the law that ADIA argues is relevant if a party commits a tort. And it also recognizes that other relevant factors like the place of performance of

the contract having a bearing on the determination of the substantive law, especially when all suggest the same jurisdiction of law.

So those aren't illegitimate considerations. They are not determinative considerations. But there's nothing illegitimate for the court to say, look, in examining the substantive law on this, what it's consistent with is the fact that the parties have chosen this forum and they've chosen this law and it specifically makes reference to the fact that they are considering giving and balancing the need to respect the law that ADIA is arguing is relevant to that tort claim.

MR. EISBERG: I would just point out that when you say consistent with, literally -- and again I'm quoting -- the panel in Stolt-Nielsen found that its conclusion is, "Consistent with New York law as articulated by the Court of Appeals in Evans v. Favored Music Corporation."

So, your Honor, whether the label is illegitimate, I think you used the word, it's not legitimate or, sorry, it's not illegitimate, whether the label -- whatever label you put on it, what Stolt-Nielsen made clear is that when you have an arbitration panel reaching out to what it calls sources of law and gives weight to what it calls sources of law, what the Supreme Court said is, you know what, really what's happening is you're applying your view of public policy and your preferences and we're going to vacate because your job, as the

Supreme Court said, your quote -- sorry, your Honor, not you -- the panel's task is to quote -- and this is in tab C, "The arbitrators' proper task was to identify the rule of law that governs."

And, again, the reason that it was vacated, and this is at 1769 in Stolt-Nielsen, is, "The panel proceeded as if it had the authority of a common law court to develop what it viewed as the best rule to be applied."

And the way the panel did it, in Stolt-Nielsen, was by saying: I'm going to look at four sets of laws. I'm analyzing them. And my view, as the panel, is that all of those taken together yield the following conclusion.

And when it came to choice of law, Stolt-Nielsen said no, it was -- it ends up being your policy preference.

By the way, there was no Freudian slip when I used the phrase de novo. I used it deliberately. And the way that I used it is because the three-judge dissent -- it was a small minority, but the three-judge dissent more than once, but at least on page 1780, characterized the review, the searching level of review that the majority did in Stolt as a, quote, de novo determination. In other words, the dissent said we don't typically see -- this was their view the dissent said they didn't typically see such serving reviews.

I'm not saying that there was de novo review. The majority didn't say it was de novo review. But when you look

at what the panel did, the Supreme Court did in Stolt-Nielsen, it shows that in a case that originated in the Southern District, went up to the Second Circuit, all the way to the Supreme Court and then back down to Judge Rakoff, it demonstrates the type of meaningful review for manifest disregard when it comes to choice of law, and for good reason.

THE COURT: It seems to me -- and I have to go through their decision in more detail in light of our discussion which has been helpful -- but it seems to me that the real critical language here is probably on the next page. And that basic language is that while ADIA, the second -- the first full bullet point and the second one after that.

"While ADIA's contention that Abu Dhabi's interests are significant is a reasonable one, when we view all relevant facts in the context of what we see as New York's significant interest in regulating New York based conduct of financial institutions in transactions of this kind, we conclude that New York's interests are, on balance, more significant than Abu Dhabi's."

Skipping two down.

"Thus, having considered international arbitration practice and relevant New York cases and having applied New York's interest analysis, we have concluded that New York law should govern all ADIA's claims including its fraud and negligent misrepresentation claims."

Now you can't have, as a conclusionary statement, an argument that this is a clear, at least representation, how, although you may say it is, that they did the proper analysis. The real question is: Does the detail of their analysis support a conclusion that they did, in fact, do what they said they did?

This is not a situation where they said they did something else that was insufficient and now, oh, you want to attack them because the record is weak -- empty of those kind of allegations.

Those two sentences seem to me to be exactly what they're supposed to do. And you're claiming that they didn't do it.

MR. EISBERG: No, no, no.

Your Honor, on those sentences what we're saying is that they did -- they did do that. They did do that and that constitutes manifest disregard.

THE COURT: What's wrong with -- what's legally wrong with anything that they said in either of those two sentences?

MR. EISBERG: So in the bullet point, the last bullet point that's not filled in that says: "Thus, having considered international arbitration practice."

THE COURT: And relevant New York cases, and having applied New York's interest analysis.

MR. EISBERG: Yes.

THE COURT: That complete sentence is totally consistent with what they're supposed to do.

Simply because they say one of the three things that they did is consider international arbitration practice, does that make it illegitimate if they did consider relevant New York cases and they applied New York's interest analysis?

MR. EISBERG: Yes. Just like in Stolt-Nielsen where what happened is --

THE COURT: No. Stolt-Nielsen, it was simply -- they simply considered international arbitration practice and didn't consider New York cases.

MR. EISBERG: That's not true.

THE COURT: And didn't apply -- well, I shouldn't say it that way because that wasn't even the context in which that decision was made.

MR. EISBERG: Your Honor the mistake, respectfully, what happened in Stolt-Nielsen, like here, is the arbitrators made up a melange, a mix of factors that they reached out and pulled together into some crazy patchwork and said we've reached out and --

THE COURT: But that's not what this says.

It says that -- you agree that if -- what this record -- if this record supports that they considered relevant New York cases and they applied New York's interest analysis, if the record supports that they did that, that would be

sufficient, wouldn't it?

Regardless of what else they did. That would be sufficient if the record supported that they did go through that analysis and applied the law that they stated that they applied, that you all agree was the right law to apply.

MR. EISBERG: If they did that in a way that had what colorable basis --

THE COURT: No. That's not right. I've got to stop you there. You can't say it like that.

They can't do it in a way that has a colorable basis. They have to do it. And the basis on which they concluded that it's New York law has a colorable basis.

MR. EISBERG: Yes, sir.

THE COURT: That's not the same as doing it in --

MR. EISBERG: Yes. Fair enough, your Honor.

And I apologize. I didn't mean to convey something different.

THE COURT: No. I just want to make sure. Because I'm going to look back at this record so I can use your words as guidance.

MR. EISBERG: The way that you just articulated it, I believe your Honor is correct.

But I would add something to that, your Honor.

THE COURT: Okay.

MR. EISBERG: It's a problem that happened here, okay.

If what you have is a situation where what your Honor just described happened, which is the panel says I have the correct choice-of-law rule and I'm going to apply it, and they do that. But then they say in deciding what the right law to apply is I'm also going to look at an additional item which is: Is there practical utility? In applying only one law?

And I'm going to also throw something else into that. I'm going to throw in twenty-one prior arbitration decisions and I'm going to consider that too. And I'm going to also throw in, well, what do I think the parties were thinking based on the time of when they brought it up. And then what we end up with is a bag of stuff that is not permitted to be looked to or permitted to be weighed by the choice-of-law rules.

And in Stolt-Nielsen, your Honor, respectfully, it's not the situation that the panel in Stolt-Nielsen said I am going to close my eyes to the law and I'm not going to do an analysis.

THE COURT: Right.

MR. EISBERG: They made a grab bag by looking at various sources of law, maritime, Second Circuit, New York law.

THE COURT: No. That's not what the case says. The case does not say that. The case said they didn't do that. They did not go to the rule of law. They didn't apply the maritime law. They didn't apply -- it says just the opposite. That's what I read over lunch. It said they didn't do that.

That's what they should have done.

MR. EISBERG: Yes.

And, your Honor, when you go back into your chambers, what I ask you to do, and when you say you'll look back at this transcript, please look back at this part of the transcript because you're right, you're absolutely right.

The Supreme Court said that in reality they didn't do an analysis that can survive manifest disregard.

But what's also a hundred percent true is that, in fact, the panel walked through the analysis, just like here.

And we quoted -- we quoted, if you look at tab C when your Honor goes back into your chambers, tab C item number 2, we have the cites to the cases that describe the award. And it says the panel based its facts on, and they talk about the analysis of international law. They looked at the twenty-one prior decisions. They also cited a New York state case law. And said it's consistent with this Evans case that they cited. They talked about and distinguished the Boeing case, the federal circuit law -- Second Circuit law on consolidation. And they also expressly analyzed maritime law.

And if your Honor goes back and looks -- because I have -- at the joint appendix that was submitted to the U.S. Supreme Court, you'll see that there was lengthy -- it attaches the transcript -- we can supply it to your Honor if it would be helpful -- the transcript of the oral argument to the panel.

There is no question --

THE COURT: But the determinative question is, in that case, is what was the reason for their determination?

And the Court clearly said -- both Judge Rakoff and the Supreme Court said the reason for their determination was because of these other opinions and was not because they did the analysis.

The example you just gave me, it is only an appropriate example if you say to me that if you take out all the extra stuff that you put in on top of it, whether or not there is a sufficient analysis under there that supports this determination, then it doesn't matter what in addition they looked at. They could look at Chinese law if they want to. But it doesn't matter as long as there's a sufficient basis in the record that shows that without the Chinese law that they did the appropriate analysis and they utilized the correct application of the rules of law that should apply.

Not simply because they say we like to do it on Thursdays too doesn't make the analysis illegitimate because they throw in another factor. It makes it illegitimate if that's the determinative factor or if without that factor that you can't tell that they have a sufficient basis to make that decision. So it doesn't matter whether they talk about ten things that they thought about. The real question is: Did they analyze the three of those ten things that they're

required to do? And those three things independently, the record shows, that they independently support that kind of a determination, even if they didn't have the other seven.

MR. EISBERG: Your Honor, in Stolt-Nielsen the panel did analyze what you're calling the one thing that actually should matter. The panel did analyze in Stolt-Nielsen.

THE COURT: No. The Supreme Court said they lacked that analysis. They did not have a sufficient legal basis and analysis beyond the 20 or whatever number of arbitration decisions they had. There was no legal rationale, and there was nothing in the record that showed that they went through the proper analysis -- as you say, as quoted here, looking at New York law, doing the choice-of-law analysis that was the deficiency in that case. If they had done that, the Court would not have been concerned about how many arbitration decisions they read and considered and thought was consistent with.

But your point is absolutely right. It can't be that -- this record has got to show me that all the other things that you say they shouldn't have considered are consistent with the analysis they did. It can't be appropriate that they did all these other things that weren't the analysis and then they want to throw in we think that's consistent with doing an analysis and we decided to do it.

They can't do it backwards. The record has got to

show that independently the analysis, regardless of what else they considered as compelling, as relevant, that the analysis itself would stand alone as demonstrating that they did a sufficient analysis of New York law and they did a sufficient choice-of-law analysis even if they thought that, you know what, when we do that analysis that analysis is consistent with the results we get when we flip a coin.

I don't care if they say it's consistent when they flip a coin. But they can't say we flipped a coin and we think that's consistent with doing the analysis.

They've got to do the analysis and simply because these things are, as you say, clouding the issue, doesn't take away from I got to look and see whether the analysis is there. It may be buried under something else, but if that analysis is there then I don't think you have an argument that simply because they threw in some other things, if the analysis independent of those other things would be sufficient -- is a sufficient basis and sufficiently articulated and demonstrates that they did it, and they have a rationale reasonable basis for doing this, I'm not sure that you could say that because they threw in something else, because they thought it was a pretty color and that's why they did it too, that that totally negates any rational, sound decision that they reached.

So I think, as I say, quite frankly the language other than the gratuitous language that you say is irrelevant, the

language that they use, conclusionary language that we were just talking about, is totally consistent with what they were supposed to do. The real question is did they really do it. And you say they didn't, that they just mouthed it like they did in other cases.

I will give you the last word if you think that that is an incorrect way for me to walk away from this. But that's where I'm looking.

I'm looking to see whether that is a sufficient -- they said they did it. You said they didn't. So I got to look at the record and see whether or not their decision or anything else that's supposed to be relevant to their decision is a sufficient basis for me to say wait a minute they did this. And I'm not supposed to say they were lying when they said they did. That's why it's supposed to be an unusual set of circumstances in which I'm supposed to set it aside. Because I'm not going to assume that these three arbitrators, you know one was picked by each side, that they would sit down put on all this work, do this arbitration, try to be as fair as they can, say they did the work. And because one side loses, say well they say they did it, they must not have done it because we lost. That's not the way it works. We all know that's not the way it works.

This was helpful. It was a very complicated scenario and I know how important it is to both sides. So I'm going to

try to get the transcript and then painstakingly go back through this and resolve the decision, either confirm or to vacate this arbitration.

MR. EISBERG: Thank you for your time.

MR. FAGEN: Ten seconds, your Honor.

I just want to correct one thing I said in describing the Cromer case. 137 F.3d -- F.Supp. 2d. I said that was a Judge Scheindlin case. It was a Judge Cote case.

And the case that was a Judge Lynch case was Thomas H. Lee, 612 F.Supp. 2d 284.

Last point, your Honor. Before you accept my adversary's characterization of the international norms analysis, a grab bag he said. I just want to make something very, very important to be clear. In Stolt-Nielsen there was no agreement between the parties expressing the parties' intent as to what the controlling authority should be. We didn't know what they wanted to do in Stolt-Nielsen.

Here the parties had a contract. They signed it. And that parties' contract said that the panel's choice of law is what is appropriate.

So I don't think it's a grab bag for the panel to have looked at those international norms. I think they were entitled to.

More than that. The international norms they looked at were bolstered by Second Circuit authority. I saw a Second

Circuit case in there.

So I don't want to demean the fact that they looked at the other stuff. They were entitled to. That's what they agreed they could do. So I don't want to discard that or agree that Stolt-Nielsen, which was about authority not propriety, is totally different, your Honor.

Thank you so much. Appreciate your time today, Your Honor.

MR. EISBERG: I just need to respond to that last thing he said about the ICDR rules. This is in our hand-up on tab B.

In Stolt-Nielsen there was also a AAA set of rules that was applicable. And the AAA set of rules that was applicable gave even more leeway to the arbitrators to decide what rule to apply.

And that's also shown, if you look at tab B, the arbitrators there, under the -- sorry. This is tab C. The AAA rules applicable in Stolt-Nielsen said the panel was free to apply any law that the arbitrator determines applies to the arbitration. And it didn't have the prohibition on ex aequo et bono. So the idea that Article 28 in the ICDR allowed them to haul off and apply their own version of policy was rejected by Stolt-Nielsen. I have a copy of the AAA rules that were in Stolt-Nielsen if you'd like to see them.

THE COURT: I can probably tell you that that point

will not be determinative.

(Adjourned)